CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED JANUARY 10, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX.

	Original	Print
Proceedings in Supreme Court of Illinois	1	1
Caption (omitted in printing)	1	
Record from Municipal Court of Chicago, Case No. 2765929	2	1
Caption (omitted in printing)	3	
Præcipe for summons (omitted in printing)	4	
Statement of claim	6	1
Exhibit "A"—Bond for $5,000.00	10	4
Summons and returns (omitted in printing)	12	
Appearance of counsel (omitted in printing)	16	
Order extending time (omitted in printing)	18	
Affidavit of merits	20	5
Order granting leave to file amended affidavit of merits (omitted in printing)	24	
Amended affidavit of merits	26	8
Order consolidating causes	29	11
Minute entries of trial (omitted in printing)	30	
Judgment	34	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1936.

—7458-C

	Original	Print
Record from Municipal Court of Chicago, Case No. 2765929—Continued.		
Notice of appeal with proof of service (omitted in printing)	36	
Præcipe for transcript of record with proof of service (omitted in printing)	40	
Notice and motion for supersedeas (omitted in printing)	44	
Order of supersedeas.....(omitted in printing)..	47	
Bond on appeal.....(omitted in printing)..	49	
Notice of motion for leave to amend præcipe (omitted in printing)	51	
Stipulation as to notice of appearance (omitted in printing)	53	
Order granting leave to file appearance (omitted in printing)	55	
Order granting leave to amend præcipe (omitted in printing	56	
Notice of appearance of appellee (omitted in printing)	58	
Stipulation re amendment of præcipe (omitted in printing)	60	
Amendment to præcipe.....(omitted in printing)..	62	
Order approving report of proceedings (omitted in printing)	63	
Report of proceedings	66	12
Caption.....(omitted in printing)..	66	
Colloquy.....(omitted in printing)..	67	
Exhibit No. 1—Stipulation of facts	72	12
Exhibits "A" & "B"—Bonds (copies) (omitted in printing)	76	
Stipulation re report of proceedings (omitted in printing)	82	
Clerk's certificate.....(omitted in printing)..	83	
Record from Municipal Court of Chicago, Case No. 2765930	85	17
Summons and return.....(omitted in printing)..	84½	
Statement of claim	85	17
Exhibit "A"—Bond for $5,000.00	91	22
Appearance of counsel.....(omitted in printing)..	91½	
Affidavit of merits	91-b	23
Amended affidavit of merits	92	26
Judgment	95	30
Notice of appeal with proof of service (omitted in printing)	96	
Præcipe for transcript of record with proof of service (omitted in printing)	98	
Motion for supersedeas.....(omitted in printing)..	100	
Order of supersedeas.....(omitted in printing)..	101	
Bond on appeal.....(omitted in printing)..	102	
Notice of motion for leave to amend præcipe (omitted in printing)	103	
Stipulation re amendment of præcipe (omitted in printing)	104	

	Original	Print
Record from Municipal Court of Chicago, Case No. 2765930—Continued.		
Amendment to præcipe.....(omitted in printing)..	105	
Order granting leave to amend præcipe (omitted in printing)	106	
Stipulation re report of proceedings (omitted in printing)	107	
Notice and motion for consolidation (omitted in printing)..	109	
Suggestions in support of motion to consolidate (omitted in printing)	111	
Stipulation as to consolidation.....(omitted in printing)..	113	
Order granting motion to consolidate.....	114	30
Order of submission.....(omitted in printing)..	115	
Opinion, Wilson, J.....	117	31
Judgments	129	43
Notice and motion for severance....(omitted in printing)..	132	
Order of severance	139	45
Petition for appeal, assignments of error and prayer for reversal (omitted in printing).....	143	
Bond on appeal .....(omitted in printing)..	149	
Order allowing appeal, etc.	153	46
Citation and service .....(omitted in printing)..	158	
Præcipe for transcript of record....(omitted in printing)..	186	
Clerk's certificates .....(omitted in printing)..	194	
Statement of points to be relied upon and designation as to printing record	196	47

[fols. 1-6]

IN MUNICIPAL COURT OF CHICAGO

First Class No. 2765929

Claim for $5,000.00

PEOPLE OF THE STATE OF ILLINOIS EX REL. WALTER W. McLAUGHLIN, Director of Agriculture, Plaintiff,

vs.

G. H. CROSS COMPANY, a Corporation and HARTFORD ACCIDENT & INDEMNITY Co., a Corporation, Defendant

STATEMENT OF CLAIM—Filed May 23, 1933

Plaintiff's claim is for money due on bond as hereinafter set forth.

Otto Kerner, Attorney General State of Illinois, by Louis Salinger, Special Asst. Attorney General, Attorney for Plaintiff, Business or Residence Address: 228 South Wabash Avenue, Chicago, Illinois.

Affidavit of Plaintiff's Claim

STATE OF ILLINOIS,
County of Cook,
City of Chicago, ss:

Horace I. Lepman, being first duly sworn, on oath states that he is the agent for the plaintiff in the above entitled cause; that he has knowledge of the facts that said cause is a suit for the recovery of money only; that the nature of plaintiff's demand is for money due on bond as herein alleged and that there is due to plaintiff, from the defendant, after allowing to defendant all just credits, deduction and set-offs the sum of Five Thousand dollars and no cents ($5,000.00).

Horace I. Lepman.

Subscribed and sworn to before me this 22nd day of May, 1933. James J. Doyle, Notary Public. (Seal.)

[fol. 7] IN MUNICIPAL COURT OF CHICAGO

[Title omitted]

STATEMENT OF CLAIM

The People of the State of Illinois, plaintiff, by Otto Kerner, Attorney General of the State of Illinois, by Louis Salinger, Assistant Attorney General, complain of the G. H. Cross Company, a corporation, and the Hartford Accident and Indemnity Company, a corporation, of a plea that they do render to the plaintiff the sum of Five Thousand Dollars ($5,000.00) which they owe to and unjustly detain from the plaintiff.

For that whereas, on the first day of July, A. D. 1931 the said G. H. Cross Company was a corporation duly organized and existing under the laws of the State of Illinois, and was engaged in the business of receiving farm produce for sale on commission at 72 South Water Market, in the City of Chicago; and

For that whereas, the defendant, Hartford Accident and Indemnity Company on said date was a corporation duly organized under the laws of the State of Connecticut and engaged in the State of Illinois in the business of acting as surety on bonds and that on the said day aforesaid the defendants did execute and deliver to the plaintiff a certain bond or undertaking.

And on that occasion they, the G. H. Cross Company, and the Hartford Accident and Indemnity Company, defendants, then and there by their writing obligatory aforesaid jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of Five Thousand Dollars ($5,000.00) to be paid to the plaintiff, [fol. 8] which said writing obligatory was and is subject to a certain condition thereon written to the effect that if the G. H. Cross Company which had applied or at the date of said bond was about to apply to the Director of Agriculture of the State of Illinois for a license to engage in the business of receiving farm produce for sale on commission until the first day of July 1932 at 70-72 South Water Market in the City of Chicago, Illinois, pursuant to the provisions of "An Act to Regulate the Consignment and Sale on commission of farm produce" approved June 28, 1919, in force July 1, 1919, as amended, and who has procured to be furnished this bond in accordance with the provisions of

said Act should honestly account for and handle all the produce received and should make payment to the consignors thereof of all moneys or things of value received for goods consigned to said principal for sale and should indemnify and keep indemnified said consignors from and against all fraudulent acts of said principal in the sale or handling of the goods of said consignors and should keep, perform and abide by all the terms, conditions and provisions of said Act and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance thereof, then the said obligation was to be void, otherwise to remain in full force and effect.

And thereupon the State of Illinois by the Director of Agriculture issued a license to the G. H. Cross Company to engage in the business of receiving farm produce for sale on commission, and thereupon the said G. H. Cross Company proceeded to engage in such business from thence hitherto.

And therefore the plaintiff says that there was delivered to the said G. H. Cross Company at 72 S. Water Market, in the City of Chicago, Illinois, certain produce for sale on commission of the kind and value by the consignor and at the time as follows:

H. N. Segerstrom, East Farms, Wash., 10-21-31, Apples, 608.15.

And for assigning a breach of said writing obligatory the plaintiff says that the said G. H. Cross Company did not honestly account for and handle nor make payment for the produce delivered as aforesaid, nor did it indemnify the consignors aforesaid against its fraudulent acts in the handling of the goods of the consignors aforesaid.

[fol. 9] By means of which premises an action has accrued to the plaintiff to demand of the defendants the sum of Five Thousand Dollars ($5,000.00).

Yet the defendants though often requested have not paid to the plaintiff the sum of money or any part thereof, but refuse so to do, to the damage of the plaintiff of Five Thousand Dollars ($5,000.00), and therefore the plaintiff brings suit.

State of Illinois, by Walter W. McLaughlin, Director of Agriculture.

By Otto Kerner, Attorney General of the State of Illinois.
By Louis Salinger, Special Asst. Attorney General.

[fols. 10-19] EXHIBIT "A" TO STATEMENT OF CLAIM

Know all men by these presents:

That we The G. H. Cross Company, as Principal and Hartford Accident and Indemnity Company, as Surety, are held and firmly bound unto the People of the State of Illinois in the sum of Five Thousand ($5,000.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

In witness whereof we have hereunto set our hands and seals this 1st day of July, A. D. 1931.

The condition of the above obligation is such that if the above bounden principal, who has applied or is about to apply to the Director of Agriculture of the State of Illinois for a license to engage in the business of receiving farm produce for sale on commission until the first day of July, 1932, at 70-72 S. Water Market, in the City of Chicago, Illinois, pursuant to the provisions of "An Act to regulate the consignment and sale on commission of farm produce," approved June 28, 1919, in force July 1, 1919, as amended, and who has procured to be furnished this bond in accordance with the provisions of said Act, shall honestly account for and handle all the produce received, and shall make payment to the consignors thereof of all moneys or things of value received for goods consigned to said principal for sale, and shall indemnify and keep indemnified said consignors from and against all fraudulent acts of said principal in the sale or handling of the goods of said consignors, and shall keep, perform and abide by all the terms, conditions and provisions of said Act, and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance thereof, then this obligation shall be void; otherwise to be and remain in full force and effect.

The G. H. Cross Company, by G. H. Cross, Pres. & Treas. (Seal.) The G. H. Cross Company, by T. A. T. Logus, Secretary. (Seal.) Hartford Accident & Indemnity Co. (Seal.) By Ward W. Wellar, Attorney-in-fact. (Seal.)

STATE OF ILLINOIS,
Cook County, ss:

I, Francis A. Kiesch, a Notary Public in and for the County and State aforesaid, do hereby certify that G. H. Cross and W. T. Rogers, who are each personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the purposes therein set forth.

Francis A. Liesch, Notary Public.

[fol. 20] IN MUNICIPAL COURT OF CHICAGO

First Class No. 2765929

[Title omitted]

AFFIDAVIT OF MERITS—Filed June 22, 1933

Laurence E. Johnson makes oath and says that he is the duly authorized agent of the defendant, Hartford Accident & Indemnity Company in the above entitled cause, and that he verily believes that it has a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

Affiant further states that the defense of the defendant to said suit is as follows:

1. Defendant avers that the alleged bond or undertaking attached to the plaintiff's statement of claim was not approved by the Director of Agriculture as is required by Section 3 of the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, under which Act such alleged bond was given.

2. Defendant denies that The G. H. Cross Company did in the manner, amount and at the time alleged in the plaintiff's statement of claim, receive farm produce on consignment at 72 South Water Market in the City of Chicago, for which it did not honestly account for and handle and make payment therefor.

3. Defendant further denies that The G. H. Cross Company committed any fraudulent acts in the handling and

sale of the farm produce described in the plaintiff's statement of claim.

4. Defendant avers that the alleged consignor of farm produce mentioned in the plaintiff's statement of claim did not within sixty days after the alleged shipment of the farm produce therein described, make a demand upon the G. H. Cross Company for either an honest accounting or payment, [fol. 21] and did not file with the Director of Agriculture a copy of this demand together with an affidavit setting forth the nature and amount of the goods consigned, the date of the consignment, the amount believed to be due and owing, together with bills of lading and delivery receipts showing the goods were shipped to and received by the consignee, The G. H. Cross Company.

5. Defendant further avers that Section 7 of the aforesaid Act requires a commission merchant to keep his records for a period of only six months, that more than nineteen months have elapsed since the date of the alleged shipment and transaction, and that such records are not now open to inspection by the plaintiff, therefore plaintiff cannot state that The G. H. Cross Company did not honestly account for and handle and make payment for the farm produce delivered to it for sale on consignment as alleged in plaintiff's statement of claim.

6. Defendant further avers that the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, is unconstitutional and void under the provisions of Article I, Section 8, clause 3 of the Constitution of the United States, in that such Act is a restriction on and a regulation of interstate commerce by the State of Illinois, and under Section 1 of the Fourteenth Amendment to the same in depriving the defendant of its property without due process of law, and a denial to the defendant of the equal protection of the laws.

7. Defendant further avers that the shipment alleged to have been made in plaintiff's statement of claim was a shipment of commodities in interstate commerce, and that if said Act of the State of Illinois is construed to cover shipments in interstate commerce it is unconstitutional and void under the provisions of Article I, Section 8, clause 3

of the Constitution of the United States in that such Act as so construed is a restriction on and a regulation of inter- [fols. 22-25] state commerce and under Section 1 of the Fourteenth Amendment of the Constitution of the United States in depriving defendant of its property without due process of law and denying to the defendant equal protection of the laws.

8. Defendant further avers that the shipment alleged by the plaintiff to have been made was a shipment in interstate commerce, and that the Congress of the United States did in 1930 enact a certain statute entitled the Perishable Commodities Act of 1930 (46 Statutes 531) which covers the subject matter of shipments in interstate commerce of perishable commodities, being the same subject matter as is covered in the above mentioned Act of the State of Illinois, and the defendant therefore avers that said statute of the State of Illinois is superseded and becomes of no effect as to such interstate shipment.

9. Defendant further avers that the aforesaid Act of the State of Illinois is unconstitutional and void under the provisions of Article II, Sections 2 and 19 of the Constitution of the State of Illinois in depriving defendant of its property without due process of law and denying to it equal protection of the law, of a legal remedy for injury to its property and of right and justice; and also under the provisions of Article IV, Section 22 of the same, in being special or class legislation. And defendant further avers that said Act of the State of Illinois is inconsistent, uncertain, incomplete and indefinite, therefore void.

10. Defendant further denies that any action has accrued to the plaintiff to demand of the defendant the sum of Five Thousand ($5,000.00) Dollars or any other sum, that the defendant owes the plaintiff this sum or any other sum, and that there is due to the plaintiff after all just credits, deductions and set-offs, the sum of Five Thousand ($5,-000.00) Dollars.

Lawrence G. Johnson.

Subscribed and sworn to before me this 20 day of June, 1933. Lulu M. Kleingruen, Notary Public. (Seal.)

[fol. 26] IN MUNICIPAL COURT OF CHICAGO

First Class No. 2765929

[Title omitted]

AMENDED AFFIDAVIT OF MERITS—Filed Oct. 13, 1933

L. W. McConnaughay makes oath and says that he is the duly authorized agent of the defendant, Hartford Accident & Indemnity Company in the above entitled cause, and that he verily believes that it has a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

Affiant further states that the defense of the defendant to said suit is as follows:

1. Defendant avers that the alleged bond or undertaking attached to the plaintiff's statement of claim, was not approved by the Director of Agriculture as is required by Section 3 of the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named", approved June 28, 1919, as amended, under which Act such alleged bond was given.

2. Defendant denies that The G. H. Cross Company did in the manner, amount, and at the time alleged in the plaintiff's statement of claim, receive farm produce on consignment at 72 South Water Market in the City of Chicago, for which it did not honestly account for and handle and make payment therefor.

3. Defendant further denies that The G. H. Cross Company committed any fraudulent acts in the handling and sale of the farm produce described in the plaintiff's statement of claim.

4. Defendant avers that the alleged consignor of farm produce mentioned in the plaintiff's statement of claim did not within sixty days after the alleged shipment of farm produce therein described, make a demand upon The G. H. Cross Company for either an honest accounting or payment, and did not file with the Director of Agriculture a copy of this demand together with an affidavit setting forth the nature and amount of the goods consigned, the date of the consignment, the amount believed to be due and owing,

together with bills of lading and delivery receipts showing the goods were shipped to and received by the consignee, The G. H. Cross Company.

5. Defendant further avers that Section 7 of the aforesaid Act requires a commission merchant to keep his records for a period of six months only, that more than nine-
[fol. 27] teen months have elapsed since the date of the alleged shipment and transaction and the filing of this action, and that such records are not now open to inspection by the plaintiff, therefore plaintiff cannot state that The G. H. Cross Company did not honestly account for and handle and make payment for the farm produce delivered to it for sale on consignment as alleged in the plaintiff's statement of claim.

6. Defendant further avers that the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named", approved June 28, 1919, as amended, is unconstitutional and void under the provisions of Article I, Section 8, clause 3 of the Constitution of the United States, in that such Act is a restriction on and a regulation of interstate commerce by the State of Illinois.

7. Defendant further avers that the bond sued on is unenforceable and void as against the defendant, The G. H. Cross Company, the principal thereon, and the defendant, Hartford Accident & Indemnity Company, the surety, or either of them, as it was exacted from the defendant, The G. H. Cross Company, under a statute of the State of Illinois entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal and Act therein named", approved June 28, 1919, as amended, requiring said defendant, The G. H. Cross Company, as a commission merchant, to apply for and secure a license before engaging in the business of a commission merchant, and requiring said commission merchant to secure and deposit with the Department of Agriculture of the State of Illinois a surety bond, which bond is now the basis of this action, which statute is contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives said defendant, The G. H. Cross Company, of its property without due process of law, and denies to it the equal protection of the laws.

8. Defendant further avers that the bond sued on in this case is void and unenforceable, as it was exacted of the defendant, The G. H. Cross Company under the terms and conditions of an Act of the State of Illinois entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named", approved June 28, 1919, as amended, which said Act was unconstitutional and void in that it contravened the provisions of Article I, Section 8, clause 3, of the constitution of the United States, as said Act was a restriction on and regulation of interstate commerce and imposed a burden on interstate commerce contrary to said provisions.

9. Defendant further avers that the shipment alleged to have been made in plaintiff's statement of claim, was a shipment of commodities in interstate commerce, and that if said Act of the State of Illinois is construed to cover shipments in interstate commerce, it is unconstitutional and void under the provisions of Article I, Section 8, clause 3, of the Constitution of the United States, in that such Act as so construed, is a restriction on and a regulation of interstate commerce.

10. Defendant further avers that the shipment alleged by the plaintiff to have been made, was a shipment in interstate commerce, and that the Congress of the United States in 1930 did enact a certain statute entitled the Perishable Commodities Act of 1930, (46 Statutes 531), which covers the subject matter of consignment shipments of perishable commodities in interstate commerce, being the same subject matter as is covered in the above mentioned Act of the State of Illinois, and the defendant avers that said statute of the State of Illinois is thereby superseded and becomes of no effect as to such shipments of perishable commodities in interstate commerce.

11. Defendant further avers that the aforesaid Act of the State of Illinois is unconstitutional and void under the provisions of Article II, Sections 2 and 19 of the Constitution of the State of Illinois, in that it deprives the defendant, The G. H. Cross Company, of its property without due process of law and denying to it equal protection of the law, and of a legal remedy for injury to its property and of right and justice and also under the provisions of Article [fol. 28] IV, Section 22 of the same, in being special or

class legislation. Defendant further avers that said Act of the State of Illinois is inconsistent, uncertain, incomplete and indefinite, therefore void.

12. Defendant further denies that any action has accrued to the plaintiff to demand of the defendant the sum of Five Thousand Dollars ($5000.00) or any other sum, that the defendant owes the plaintiff this sum or any other sum, and that there is due to the plaintiff after all its just credits, deductions and set-offs, the sum of Five Thousand Dollars ($5,000.00).

Lloyd W. McConnaughay.

Subscribed and sworn to before me this 13th day of October, A. D. 1933. Paul O. Menges, Notary Public. (Seal.)

[fols. 29-33] In Municipal Court of Chicago

[Title omitted]

First Class. No. 2765929

Order Consolidating Causes—Dec. 29, 1933

By agreement of the plaintiffs and the defendant herein, it is ordered by the Court that this cause be consolidated with case #2765930.

[fols. 34-65] In Municipal Court of Chicago

First Class No. 2765929

The People of the State of Illinois, etc.

vs.

G. H. Cross Company, etc., et al.

Judgment—Feb. 13, 1934

Finding: issues for plaintiff and against defendants, G. H. Cross Company, a corporation, and Hartford Accident & Indemnity Co., a corporation. Defendant, Hartford Accident & Indemnity Co. excepts.

Motion for new trial made and overruled. Exception.

Motion for arrest of judgment made and overruled. Exception.

Judgment on finding versus defendants G. H. Cross Company, a corporation, and Hartford Accident & Indemnity Co., a corporation, in debt $5,000.00; damages assessed $608.15. Judgment to be satisfied upon the payment of $608.15 with costs and interest from date of judgment, and that execution issue thereon.

Defendant duly excepts.

Enter.

John J. Lupe, Judge, Municipal Court.

February 13, 1934.

[fols. 66-71] In Municipal Court of Chicago

No. 2765929

[Title omitted]

Report of Proceedings—Filed March 24, 1934

[fol. 72] Exhibit 1

In Municipal Court of Chicago

[Title omitted]

Stipulation of Facts

It is hereby stipulated and agreed by and between The People of the State of Illinois, ex rel Walter W. McLaughlin, Director of Agriculture through its attorney, Otto Kerner, Attorney General of the State of Illinois by Louis Salinger, Assistant Attorney General and Hartford Accident and Indemnity Company through its attorney, Arthur L. Israel, that the following stipulation of Facts made a part hereof and hereto attached including the copies of documents attached hereto as exhibits, when offered in evidence either in whole or in part, by any party to this cause in any trial of this cause, shall be received in evidence by the *the* court, subject to the limitations named herein, and subject to all objections as to relevancy

and materiality, but upon no other grounds, and shall be given the same force and effect as if witnesses duly qualified and competent were called and testified to the fact and exhibits herein set forth.

It is further agreed that all copies of exhibits attached to this Stipulation, as referred to herein, shall be given like effect as though they were originals properly identified and were set out in full in this Stipulation, instead of being attached as exhibits, and shall be received in evidence by the court subject only to the objections referred to above.

Any party to this Stipulation may offer in evidence any or all parts thereof as he may desire.

Any party to this Stipulation may submit such further evidence upon any fact in issue in this case as may be otherwise relevant, material or competent.

Otto Kerner, Attorney General of Illinois, by Louis Salinger, Asst. Attorney General for Plaintiff.
Arthur L. Israel, Attorney for Hartford Accident and Indemnity Company.

[fol. 73] 1. The G. H. Cross Company was a corporation organized under the laws of the State of Illinois, its place of business being Nos. 70 and 72 South Water Market in the City of Chicago, and that it there solicited shipments of farm produce as defined in Section 1 of "An Act to regulate the consignment and sale on commission of farm produce and to repeal an Act therein named", approved June 28, 1919, as amended, from dealers and producers throughout the United States, and received from these dealers and producers shipments of farm produce as so defined, which it handled for their account, charging a commission for such handling and sale. All farm produce received and handled was sold in the original packages as received from the consignors and no consignments were purchased by the G. H. Cross Company for its own account and resold by it.

2. Practically all the farm produce handled by the G. H. Cross Company originated and was shipped from states other than Illinois, less than five per cent of the total volume originating in Illinois. All shipments of farm produce remained the property of the consignors until sold for their account by The G. H. Cross Company.

3. The G. H. Cross Company could not have made a success of handling farm produce on consignments by handling only farm produce originating in Illinois. The shipments received from outside the State of Illinois increased and enhanced its business greatly, but it was necessary to handle, during certain periods of the year, shipments originating in the State of Illinois. The legislature in 1929 increased the size of the bond required from $2000.00 to $5000.00 and the premium on the larger bond was increased from $25.00 to $50.00 in 1930 and thereafter.

4. Even if the G. H. Cross Company had been engaged exclusively in the business of receiving consignments from outside the State of Illinois, the Director of the Department of Agriculture would have demanded that it procure a license and bond as set forth in Section 3 of the aforesaid Act provided, if the Department of Agriculture had knowledge that the said G. H. Cross Company was engaged in the interstate business as aforesaid.

5. As interpreted by the Director of the Illinois Department of Agriculture, the aforesaid Act required the G. H. Cross Company to secure a license and bond, and in order to be protected from prosecution thereunder, and in consequence of said interpretation, it did procure a license for the years beginning July 1, 1931 and July 1, 1932 and as a condition precedent therefor, did procure and submit certain surety bonds in the penal sum of $5000 each on which it was principal and the Hartford Accident & Indemnity Company was surety, copy of which bonds are attached herewith, and made a part hereof as Exhibits "A" and "B".

6. The facts set forth in items 1 to 5 inclusive of this stipulation apply equally as well to other persons, firms or corporations in the City of Chicago who would solicit, receive and handle farm produce for sale on commission.

7. The Hartford Accident and Indemnity Company as surety on the two bonds of the G. H. Cross Company for the years 1931 and 1932 herein referred to as Exhibits "A" and "B" was and since is in the business of surety for profit receiving therefor a cash premium for the purpose of entering on said bonds which premiums in each case amounted to $50.00 and which premiums were received by aforesaid Hartford Accident and Indemnity Company as consideration of issuance of aforesaid bonds.

8. The bonds were received in the Illinois Department of Agriculture in the City of Chicago and were filed in said Department and after filing thereof the Department of Agriculture at the request of the Director of Agriculture in each respective case aforesaid issued a license to said G. H. Cross Company for the purpose of permitting them to enter into and engage in the business of commission merchant as provided in said Act referred to in Paragraph 1 above, and the said G. H. Cross Company accepted said license and proceeded to act as commission merchants.

[fol. 74] 9. The G. H. Cross Company was actively engaged in the business of commission merchant from and for a long time preceding July 1, 1931 to October 12, 1932, on which date an involuntary petition in bankruptcy was duly filed against it in the United States District Court, for the Northern District of Illinois, Eastern Division thereof. On the 4th of November, 1932, said G. H. Cross Company was adjudged a bankrupt. During the said period from July 1, 1931, to October 12, 1932, in the case of each consignor on account of whom it had received and handled farm produce, said G. H. Cross Company did issue and mail an account of sales showing the selling price of the consigned produce, the transportation and drayage charges, the commission or brokerage, and the net proceeds due to such consignors, said account of sales being true and accurate, and free from fraud.

10. The shipments of farm produce alleged in the plaintiff's statement of claim were made to the G. H. Cross Company on the dates stated, the amounts due on these shipments are as there stated, and so appear on the books of the G. H. Cross Company but that no part of said accounts have been paid to the various consignors.

11. No demand on the G. H. Cross Company was made by any of the consignors of the above described farm produce within sixty days after such shipment, for either an honest accounting or payment, neither was any copy of such demand together with bills of lading and express receipts showing that the goods were shipped to and received by the G. H. Cross Company sent to the Department of Agriculture together with a verified statement from such consignor within ten days after such demand, stating the amount believed to be due and owing. Further, the Department of Agriculture was not so informed by any such

consignor and not having received any such verified complaint no hearing was called thereon, nor was the license of the G. H. Cross Company revoked at any time within aforementioned period, nor was said company ever prosecuted for failure to honestly account for and handle and make payment to the consignors of farm produce of all moneys or things of value received by it from the sale of such farm produce.

12. On or about October 13, 1931, H. N. Segerstrom of East Farms, Washington, consigned to the G. H. Cross Company certain apples which the G. H. Cross Company agreed to handle on a commission basis in accordance with the definitions given a commission merchant under the Act hereinbefore stated. The net proceeds of this consignment, as shown by the books of the G. H. Cross Company was $608.15, and for which said H. N. Segerstrom was not paid. As is the custom on the part of commission merchants in handling certain car load lot shipments of apples, some apples shipped by H. N. Segerstrom of East Farms, Washington were placed in cold storage by the G. H. Cross Company and charges amounting to the sum of $168.93 were deducted from the gross sales as indicated in the account sales dated July 13, 1932. These apples were sold on different dates prior to July 1, 1932, but the consignor was advised thereof subsequent to July 13, 1932. The storage of these apples by the consignee was for the sole purpose of getting the best selling price for these apples. An account sales from the G. H. Cross Company to the said H. N. Segerstrom was prepared as shown by their said account sales of July 13, 1932 and subsequently thereto said account sales was mailed to the said H. N. Segerstrom at East Farms, Washington.

13. By virtue of an Act of Congress of the United States, entitled "The Perishable Agricultural Commodities Act of 1930" (46 Stat. 531—71st Congress), the said G. H. Cross Company was duly licensed as a commission merchant by the United States Department of Agriculture for the periods from July 1, 1931 to July 1, 1932 and from July 1, 1932 to July 1, 1933.

14. The Illinois Department of Agriculture did not inspect the premises books or records of the G. H. Cross Company at any time during the period *of* from July 1, 1931 to July 1, 1933, on its own motion or in response

to any complaint against the company received by it, neither does it know that the shipments alleged in the statement of claim herein, are the only shipments received by the G. H. Cross Company for which payment has not been made to the consignors thereof or for which an honest accounting may be claimed not to have been made. But it is a fact, however, that when the G. H. Cross Com-
[fol. 75] pany went into bankruptcy, the claims upon which these suits are based were actual claims as shown by the books of the G. H. Cross Company in bankruprcy proceedings and as far as known by the Department of Agriculture is a complete list of consignment creditors of said G. H. Cross Company.

O. K., J. D. D.

[fol. 76] Exhibit "A" to stipulation of facts omitted. Printed side page 10, ante.

[fols. 77-84] Exhibit "B" to stipulation of facts omitted. Printed side page 91, post.

[fol. 85] IN MUNICIPAL COURT OF CHICAGO

First Class No. 2765930

PEOPLE OF THE STATE OF ILLINOIS ex Rel. WALTER W. McLAUGHLIN, Director of Agriculture, Plaintiff,

vs.

G. H. CROSS COMPANY, a Corporation, and HARTFORD ACCIDENT & INDEMNITY Co., a Corporation, Defendant

Claim for $5000.00

STATEMENT OF CLAIM

Plaintiff's claim is for money due on bond as hereinafter set forth.

Otto Kerner, Attorney General State of Illinois, by Louis Salinger, Special Asst. Attorney General, Attorney for Plaintiff, Business or Residence Address: 228 South Wabash Avenue, Chicago, Illinois.

Affidavit of Plaintiff's Claim

STATE OF ILLINOIS,
County of Cook,
City of Chicago, ss:

Horace I. Lepman, being first duly sworn, on oath states that he is the agent for the plaintiff in the above entitled cause; that he has knowledge of the facts that said cause is a suit for the recovery of money only; that the nature of plaintiff's demand is for money due on bond as herein alleged, and that there is due to plaintiff, from the defendant, after allowing to defendant all just credits, deduction and set-offs, the sum of five thousand dollars and no cents ($5,000.00).

Horace I. Lepman.

Subscribed and sworn to before me this 22nd day of May, 1933. James J. Doyle, Notary Public. (Seal.)

[fol. 86] IN MUNICIPAL COURT OF CHICAGO

[Title omitted]

STATEMENT OF CLAIM

The People of the State of Illinois, plaintiff, by Otto Kerner, Attorney General of the State of Illinois, by Louis Salinger, Assistant Attorney General, complain of the G. H. Cross Company, a corporation, and the Hartford Accident and Indemnity Company, a corporation, of a plea that they do render to the plaintiff the sum of Five Thousand Dollars ($5,000.00) which they owe to and unjustly detain from the plaintiff.

For that whereas, on the first day of July, A. D. 1932, the said G. H. Cross Company was a corporation duly organized and existing under the laws of the State of Illinois, and was engaged in the business of receiving farm produce for sale on commission at 72 South Water Market, in the City of Chicago; and

For that whereas, the defendant, Hartford Accident and Indemnity Company on said date was a corporation duly organized under the laws of the State of Connecticut and engaged in the State of Illinois in the business of acting as surety on bonds and that on the said day aforesaid the

defendants did execute and deliver to the plaintiff a certain bond or undertaking.

[fol. 87] And on that occasion they, the G. H. Cross Company, and the Hartford Accident and Indemnity Company, defendants, then and there by their writing obligatory aforesaid jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of Five Thousand Dollars ($5,000.00) to be paid to the plaintiff, which said writing obligatory was and is subject to a certain condition thereon written to the effect that if the G. H. Cross Company which had applied or at the date of said bond was about to apply to the Director of Agriculture of the State of Illinois for a license to engage in the business of receiving farm produce for sale on commission until the first day of July, 1933, at 70-72 South Water Market in the City of Chicago, Illinois, pursuant to the provisions of "An Act to Regulate the Consignment and Sale on commission of farm produce" approved June 28, 1919, in force July 1, 1919, as amended, and who has procured to be furnished this bond in accordance with the provisions of said Act should honestly account for and handle all the produce received and should make payment to the consignors thereof of all moneys or things of value received for goods consigned to said principal for sale and should indemnify and keep indemnified said consignors from and against all fraudulent acts of said principal in the sale or handling of the goods of said consignors and should keep, perform and abide by all the terms, conditions and provisions of said Act and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance thereof, then the said obligation was to be void, otherwise to remain in full force and effect.

And thereupon the State of Illinois by the Director of Agriculture issued a license to the G. H. Cross Company to engage in the business of receiving farm produce for sale on commission, and thereupon the said G. H. Cross Company proceeded to engage in such business from thence hitherto.

[fol. 88] And therefore the plaintiff says that there was delivered to the said G. H. Cross Company at 72 S. Water Market, in the City of Chicago, Illinois, certain produce for sale on commission of the kind and value by the consignors and at the times as follows:

Auburn Vegetable Growers	Auburn, Wash.	7-12-32	Cauliflower	$299.92
" " "	" "	7-20-32	Lettuce	
" " "	" "	8 -1-32	Lettuce	
Brandenburg, Frank	Vincennes, Ind.	7-25-32	Tomatoes	2.35
Dyer, John N.	" "	7-28-32	Apples, Toms., Cant.	108.63
Ehrlich, Wm.	Bloomington, Ill.	7-27-32	Tomatoes	13.99
" "	" "	7-28-32	"	
" "	" "	8- 2-32	"	
" "	" "	8- 4-32	"	
" "	" "	8- 6-32	"	
F. Fossmeyer & Sons	Vincennes, Ind.	7-26-32	Cantaloupes	1432.86
" "	" "	7-27-32	"	
" "	" "	7-28-32	"	
" "	" "	7-30-32	"	
" "	" "	8- 1-32	"	
" "	" "	7-26-32	"	
" "	" "	7-28-32	"	
Hogmire, W. H.	Bangor, Mich.	7-28-32	Apples	111.15
" "	" "	7-28-32	"	
" "	" "	8- 1-32	"	
" "	" "	8- 3-32	"	
" "	" "	8- 4-32	"	
W. F. Holland	Vincennes, Ind.	7-28-32	Cantaloupes	891.26
" "	" "	7-29-32	"	
" "	" "	7-30-32	Peaches, Tom., Cant.	
" "	" "	8- 4-32	Cantaloupes	
House, E. H.	Saugatuck, Mich.	7-29-32	Cherries	20.96
" "	" "	7-30-32	"	
Independent Melon Growers	Decker, Ind.	7-25-32	Cantaloupes	396.20
" " "	" "	7-25-32	"	
Kivits Bros.	Terre Haute, Ind.	7-27-32	Cucumbers	116.61
" "	" "	7-28-32	"	
" "	" "	7-29-32	"	
" "	" "	7-30-32	"	
Mowrey, C. W.	Anna, Ill.	7-26-32	Apples	136.78
" "	" "	7-27-32	"	
Royse Oexman	Vincennes, Ind.	7-27-32	Cantaloupes	154.98
Oexman, Walter	" "	8- 4-32	"	16.30
Osborne, M. A.	" "	8- 3-32	"	16.59
Osborne, Riley	" "	8- 1-32	Cantaloupes	471.18
" "	" "	8- 2-32	"	
" "	" "	8- 3-32	"	
Reitmeyer, Albert	" "	8- 2-32	Cantaloupes	410.07
" "	" "	8- 3-32	"	
" "	" "	8- 5-32	"	
[fol. 89]				
Reitmeyer, Ernest	Vincennes, Ind.	8- 4-32	Cantaloupes	54.00
Reitmeyer, Raymond	" "	7-25-32	"	18.15
Rendleman, Warren	Alto Pass, Ill.	8- 1-32	Tomatoes	7.07
" "	" " "	8- 4-32	"	

Santa Maria Produce Co.	Guadalupe, Cal.	5-18-32	Carrots	
" " " "	" "	5-24-32	"	
" " " "	" "	5-25-32	"	
" " " "	" "	5-28-32	"	
" " " "	" "	5-28-32	Lettuce	1,407.88
" " " "	" "	6- 4-32	"	
" " " "	" "	6-11-32	"	
" " " "	" "	8- 2-32	"	
F. H. Simpson Co.	Flora, Ill.	7-23-32	Apples	
" " "	" "	7-25-32	"	224.71
A. J. & C. E. Wharf	Vincennes, Ind.	7-25-32	Apples	23.21
John Dyer	" "	7-25-32	Apples	21.68
Sound Prod. Shippers, Inc.	Seattle, Wash.	7- 9-32	Lettuce	
" " " "	" "	7- 8-32	"	
" " " "	" "	7-12-32	"	
" " " "	" "	7-12-32	"	
" " " "	" "	7- 6-32	"	1,385.43
" " " "	" "	7-20-32	"	
" " " "	" "	7-25-32	"	
" " " "	" "	7-20-32	"	
Spencer, L. A.	South Haven, Mich.	7-28-32	Apples	3.76
Teschner, W. C.	Vincennes, Ind.	8- 4-32	Peaches	21.90
United Farmers Assn., of California	Los Angeles, Cal.	7-12-32	Peppers	126.39
Wash. Pea Gr. & Shippers Assn.,	Kent, Wash.	7-11-32	Peas	
" "	" "	6-30-32	Lettuce & Cauli.	
" "	" "	7-26-32	Mixed Vegts.	
" "	" "	6-28-32	Lettuce & Cauli.	
" "	" "	7- 5-32	Mixed Vegt.	
" "	" "	7- 9-32	Lettuce & Cauli.	
" "	" "	7- 4-32	Cauliflower	
" "	" "	7- 5-32	Lettuce	
" "	" "	6-24-32	Lettuce	5,152.74
" "	" "	7-12-32	Mixed Vegts.	
" "	" "	7-15-32	Peas	
" "	" "	7-11-32	Lettuce & Cauli.	
" "	" "	6-24-32	Lettuce & Cauli.	
" "	" "	7-19-32	Lettuce & Cauli.	
" "	" "	8- 1-32	Lettuce & Cauli.	
" "	" "	7-14-32	Lettuce & Peas	
" "	" "	7-21-32	Cauli. & Peas	
Wilson, W. A.	Vincennes, Ind.	8- 5-32	Cantaloupes	130.39
Burroughs, H. P.	Emmett, Idaho	6-28-32	Cherries	
" "	" "	7- 5-32	"	15.88
" "	" "	7- 6-32	"	
Tucker, W. C.	Emmett, Idaho	6-28-32	Cherries	
" "	" "	7- 5-32	"	641.52
" "	" "	7- 6-32	"	
Emmett Fruit Distbrs.	Emmett, Idaho	7- 5-32	Cherries	
" " "	" "	7- 6-32	"	2.18
[fol. 90]				
H. Shropshire	Emmett, Idaho	7- 5-32	Cherries	
" "	" "	7- 6-32	Cherries	21.68
Jason Kelly	Emmett, Idaho	7- 5-32	Cherries	
" "	" "	7- 6-32	"	35.12
J. L. Hall	Emmett, Idaho	7- 5-32	Cherries	2.62

And for assigning a breach of said writing obligatory the plaintiff says that the said G. H. Cross Company did not honestly account for and handle nor make payment for the produce delivered as aforesaid, nor did it indemnify the consignors aforesaid against its fraudulent acts in the handling of the goods of the consignors aforesaid.

By means of which premises an action has accrued to the plaintiff to demand of the defendants the sum of Five Thousand Dollars ($5,000.00).

Yet the defendants though often requested have not paid to the plaintiff that sum of money or any part thereof, but refuse so to do, to the damage of the plaintiff of Five Thousand Dollars ($5,000.00), and therefore the plaintiff brings suit.

State of Illinois, by Walter W. McLaughlin, Director of Agriculture.

By Otto Kerner, Attorney General of the State of Illinois.
By Louis Salinger, Special Asst. Attorney General.

[fols. 91-91a] EXHIBIT "A" TO STATEMENT OF CLAIM

Know all men by these presents:

That we The G. H. Cross Company, as Principal, and Hartford Accident and Indemnity Company, as Surety, are held and firmly bound unto the people of the State of Illinois in the sum of Five Thousand ($5,000.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

In witness whereof we have hereunto set our hands and seals this 1st day of July, A. D. 1932.

The condition of the above obligation is such that if the above bounden principal, who has applied or is about to apply to the Director of Agriculture of the State of Illinois for a license to engage in the business of receiving farm produce for sale on commission until the first day of July, 1933, at 70-72 South Water Market, Chicago, Illinois, in the City of —, Illinois, pursuant to the provisions of "An Act to regulate the consignment and sale on commission of farm produce," approved June 28, 1919, in force July 1,

1919, as amended, and who has procured to be furnished this bond in accordance with the provisions of said Act, shall honestly account for and handle all the produce received, and shall make payment to the consignors thereof of all moneys or things of value received for goods consigned to said principal for sale, and shall indemnify and keep indemnified said consignors from and against all fraudulent acts of said principal in the sale or handling of the goods of said consignors, and shall keep, perform and abide by all the terms, conditions and provisions of said Act, and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance thereof, then this obligation shall be void; otherwise to be and remain in full force and effect.

The G. H. Cross Company, Pres. (Seal.) Robert L. Berner, Secy. (Seal.) Hartford Accident & Indemnity Company, (Seal.) by Ward W. Wellar, Attorney-in-fact. (Seal.)

STATE OF ILLINOIS,
Cook County, ss:

I, Gilbert J. Boie, a Notary Public in and for the County and State aforesaid, do hereby certify that G. H. Cross and Robert F. Berner, who are each personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the purposes therein set forth.

Gilbert J. Boie, Notary Public.

[fol. 91b] IN MUNICIPAL COURT OF CHICAGO

First Class No. 2765930

[Title omitted]

AFFIDAVIT OF MERITS—Filed June 22, 1933

Lawrence E. Johnson makes oath and says that he is the duly authorized agent of the defendant, Hartford Accident & Indemnity Company in the above entitled cause, and that

he verily believes that it has a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

Affiant further states that the defense of the defendant to said suit is as follows:

1. Defendant avers that the alleged bond or undertaking attached to the plaintiff's statement of claim was not approved by the Director of Agriculture as is required by Section 3 of the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, under which Act such alleged bond was given.

2. Defendant denies that The G. H. Cross Company did in the manner, amount and at the times alleged in the plaintiff's statement of claim, receive farm produce on consign- [fol. 91c] ment at 72 South Water Market in the City of Chicago, for which it did not honestly account for and handle and make payment therefor.

3. Defendant further denies that The G. H. Cross Company committed any fraudulent acts in the handling and sale of the farm products described in the plaintiff's statement of claim.

4. Defendant avers that the alleged consignors of farm produce mentioned in the plaintiff's statement of claim did not within sixty days after the alleged shipments of farm produce therein described, make demands upon The G. H. Cross Company for either an honest accounting or payment, and did not file with the Director of Agriculture copies of such demands together with affidavits setting forth the nature and amount of the goods consigned, the dates of the consignments, the amounts believed to be due and owing, together with bills of lading and delivery receipts showing the goods were shipped to and received by the consignee, The G. H. Cross Company.

5. Defendant further avers that Section 7 of the aforesaid Act requires a commission merchant to keep his records for a period of only six months, that more than nine months have elapsed since the date of the alleged shipments and transactions, and that such records are not now open to inspection by the plaintiff, therefore plaintiff cannot state that the G. H. Cross Company did not honestly account for and handle and make payment for the farm pro-

duce delivered to it for sale on consignment as alleged in plaintiff's statement of claim.

6. Defendant further avers that the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, is unconstitutional and void under the provisions of Article I, Section 8, clause 3 of the Constitution of the United States, in that such Act [fol. 91d] is a restriction on and a regulation of interstate commerce by the State of Illinois, and under Section 1 of the Fourteenth Amendment to the same in depriving the defendant of its property without due process of law, and a denial to the defendant of the equal protection of the laws.

7. Defendant further avers that many of the shipments alleged to have been made in plaintiff's statement of claim were shipments of commodities in interstate commerce, and that if the said Act of the State of Illinois is construed to cover shipments in interstate commerce it is unconstitutional and void under the provisions of Article I, Section 8, clause 3 of the Constitution of the United States in that such Act as so construed is a restriction on and a regulation of interstate commerce, and under Section 1 of the Fourteenth Amendment of the Constitution of the United States in depriving defendant of its property without due process of law and denying to the defendant equal protection of the laws.

8. Defendant further avers that a great many of the shipments alleged by the plaintiff to have been made were shipments in interstate commerce, and that the Congress of the United States did in 1930 enact a certain statute entitled the Perishable commodities Act of 1930 (46 Statutes 531) which covers the subject matter of shipments in interstate commerce of perishable commodities, being the same subject matter as is covered in the above mentioned Act of the State of Illinois, and the defendant therefore avers that said statute of the State of Illinois is superseded and becomes of no effect as to such interstate shipments.

9. Defendant further avers that the aforesaid Act of the State of Illinois is unconstitutional and void under the provisions of Article II, Sections 2 and 19 of the Constitution [fols. 91e & 91f] of the State of Illinois in depriving defend-

ant of its property without due process of law and denying to it equal protection of the law, of a legal remedy for injury to its property and of right and justice; and also under the provisions of Article IV, Section 22 of the same, in being special or class legislation. And defendant further avers that said Act of the State of Illinois is inconsistent, uncertain, incomplete and indefinite, therefore void.

10. Defendant further denies that any action has accrued to the plaintiff to demand of the defendant the sum of Five Thousand ($5000.00) Dollars or any other sum, that the defendant owes the plaintiff this sum or any other sum, and that there is due to the plaintiff after all its just credits, deductions and set-offs, the sum of Five Thousand ($5000.00) Dollars.

Lawrence E. Johnson.

Subscribed and sworn to before me this 20 day of June, 1933. Lulu M. Klengman, Notary Public. (Seal.)

[fol. 92] IN MUNICIPAL COURT OF CHICAGO

First Class No. 2765930

[Title omitted]

AMENDED AFFIDAVIT OF MERITS

L. W. McConnaughay makes oath and says that he is the duly authorized agent of the defendant, Hartford Accident & Indemnity Company in the above entitled cause, and that he verily believes that it has a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

Affiant further states that the defense of the defendant to said suit is as follows:

1. Defendant avers that the alleged bond or undertaking attached to the plaintiff' statement of claim, was not approved by the Director of Agriculture as is required by Section 3 of the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, under which Act such alleged bond was given.

2. Defendant denies that The G. H. Cross Company did in the manner, amount, and at the times alleged in the plaintiff's statement of claim, receive farm produce on consignment at 72 South Water Market in the City of Chicago, for which it did not honestly account for and handle and make payment therefor.

3. Defendant further denies that The G. H. Cross Company committed any fraudulent acts in the handling and sale of the farm produce described in the plaintiff's statement of claim.

4. Defendant avers that the alleged consignors of farm produce mentioned in the plaintiff's statement of claim did not within sixty days after the alleged shipments of farm produce therein described make demands upon The G. H. Cross Company for either an honest accounting or payment, and did not file with the Director of Agriculture copies of such demands together with affidavits setting forth the nature and amount of the goods consigned, the dates of the consignments, the amounts believed to be due and owing, together with bills of lading and delivery receipts showing the goods were shipped to and received by the consignee, The G. H. Cross Company.

[fol. 93] 5. Defendant further avers that Section 7 of the aforesaid Act requires a commission merchant to keep his records for a period of six months only, that more than nine months have elapsed since the date of the alleged shipments and transactions and the filing of this action, and that such records are not now open to inspection by the plaintiff, therefore plaintiff cannot state that The G. H. Cross Company did not honestly account for and handle and make payment for the farm produce delivered to it for sale on consignment as alleged in the plaintiff's statement of claim.

6. Defendant further avers that the Act entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, is unconstitutional and void under the provisions of Article I, Section 8, clause 3 of the Constitution of the United States, in that such Act is a restriction on and a regulation of interstate commerce by the State of Illinois.

7. The bond sued on, defendant avers, is unenforceable and void as against the defendant The G. H. Cross Company, the principal thereon, and the defendant Hartford Accident & Indemnity Company, the surety, or either of them, as it was exacted from the defendant The G. H. Cross Company, under a statute of the State of Illinois entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, requiring said defendant, The G. H. Cross Company, as a commission merchant, to apply for and secure a license before engaging in the business of a commission merchant, and requiring said commission merchant to secure and deposit with the Department of Agriculture of the State of Illinois a surety bond, which bond is now the basis of this action, which said statute is contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives said defendant, The G. H. Cross Company, of its property without due process of law, and denies to it the equal protection of the laws.

8. Defendant further avers that the bond sued on in this case is void and unenforceable, as it was exacted of the defendant, The G. H. Cross Company under the terms and conditions of an Act of the State of Illinois entitled: "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," approved June 28, 1919, as amended, which said Act was unconstitutional and void in that it contravened the provisions of Article I, Section 8, clause 3, of the Constitution of the United States, as said Act was a restriction on and regulation of interstate commerce and imposed a burden on interstate commerce contrary to said provisions.

9. Defendant further avers that many of the shipments alleged to have been made in plaintiff's statement of claim, were shipments of commodities in interstate commerce, and that if said Act of the State of Illinois is construed to cover shipments in interstate commerce, it is unconstitutional and void under the provisions of Article I, Section 8, clause 3 of the Constitution of the United States, in that such Act as so construed, is a restriction on and a regulation of interstate commerce.

10. Defendant further avers that the aforesaid Act of the State of Illinois is unconstitutional and void under the pro-

visions of Article II, Sections 2 and 19 of the Constitution of the State of Illinois, in that it deprives the defendant, The G. H. Cross Company, of its property without due process of law and denying to it equal protection of the law, and of a legal remedy for injury to its property and of right and justice; and also under the provisions of Article [fol. 94] IV, Section 22 of the same, in being special or class legislation. Defendant further avers that said Act of the State of Illinois is inconsistent, uncertain, incomplete and indefinite, therefore void.

11. Defendant further avers that a great many of the shipments alleged by the plaintiff to have been made, were shipments in interstate commerce, and that the Congress of the United States in 1930 did enact a certain statute entitled the Perishable Commodities Act of 1930, (46 Statutes 531) which covers the subject matter of consignment shipments in interstate commerce of perishable commodities, being the same subject matter as is covered in the above mentioned Act of the State of Illinois, and the defendant therefore avers that said statute of the State of Illinois is thereby superseded and becomes of no effect as to such interstate commerce of consignments of perishable commodities.

12. Defendant further denies that any action has accrued to the plaintiff to demand of the defendant the sum of Five Thousand Dollars ($5000.00) or any other sum, that the defendant owes the plaintiff this sum or any other sum, and that there is due to the plaintiff after all its just credits, deductions and set-offs, the sum of Five Thousand Dollars ($5000.00).

Lloyd W. McConnaughay.

Subscribed and sworn to before me this 13th day of October, A. D. 1933. Paul O. Menges, Notary Public. (Seal.)

[fols. 95-113] In Municipal Court of Chicago

First Class No. 2765930

The People of the State of Illinois, etc.

vs.

G. H. Cross Company, etc., et al.

Judgment—Feb. 13, 1934

Finding: issues for plaintiff and against defendants, G. H. Cross Company, a corporation, and Hartford Accident & Indemnity Co., a corporation. Defendant, Hartford Accident & Indemnity Co. excepts.

Motion for new trial made and overruled. Exception.

Motion for arrest of judgment made and overruled. Exception.

Judgment on finding versus defendants G. H. Cross Company, a corporation, and Hartford Accident & Indemnity Co., a corporation, in debt, $5,000.00; damages assessed $13,896.14. Judgment to be satisfied upon the payment of $5,000.00 with costs and interest from date of judgment, and that execution issue thereon.

Defendant duly excepts.

Enter.

John J. Lupe, Judge, Municipal Court.

February 13, 1934.

[fols. 114-116] In Supreme Court of Illinois

No. 22532

People State of Illinois ex Rel. Walter W. McLaughlin, Director of Agriculture, Appellee,

vs.

G. H. Cross Company, and The Hartford Accident and Indemnity Company, Appellants

Appeal Municipal Court of Chicago

Order Granting Motion to Consolidate—April 19, 1934

Now on this day the Court having considered motion by appellants to consolidate this cause with No. 22533, People

ex rel. Walter W. McLaughlin, Director of Agriculture, appellee, vs. G. H. Cross Company and The Hartford Accident and Indemnity Company, appellants, and to submit both cases on consolidated abstract of record and one set of briefs and reply briefs, and the Court being advised in the premises grants the motion.

[fol. 117] IN SUPREME COURT OF ILLINOIS

Docket Nos. 22532-22533—Agenda 38—October, 1934.

THE PEOPLE ex Rel. WALTER W. McLAUGHLIN, Director of Agriculture, Appellee,

v.

THE G. H. CROSS COMPANY et al.—(THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, Appellant)

OPINION—Filed Oct. 14, 1935

MR. JUSTICE WILSON delivered the opinion of the court:

Two actions of debt were brought in the name of the People of the State of Illinois by the Director of Agriculture on behalf of various shippers against the G. H. Cross Company and the defendant the Hartford Accident and Indemnity Company, in the municipal court of Chicago, for the recovery on two bonds given by the parties named, as principal and surety, to the People of the State of Illinois in the sum of $5000. The two cases were consolidated and heard on an agreed statement of facts. Judgment was rendered for the Director of Agriculture. The surety has appealed to this court.

The statement of claim set forth that the G. H. Cross Company was on July 1, 1931, a corporation organized under the laws of Illinois and thereafter engaged in the business of receiving farm products for sale on commission. The Hartford Accident and Indemnity Company was on that date a corporation acting as surety on bonds. The principal and surety herein named entered into a written obligation reciting that the G. H. Cross Company had applied to the Director of Agriculture of this State for a license to engage in the business of receiving farm products for sale on commission, pursuant to the provisions of "An

act to regulate the consignment and sale on commission of farm produce," approved June 28, 1919, in force July 1, 1919, as amended. The bond was in accordance with the provisions of the act, and was conditioned that if the principal should honestly account for and handle all the produce received, make payment to the consignors of all moneys received for merchandise consigned, and should indemnify and keep indemnified the consignors from and against all fraudulent acts in the sale and handling of the produce of the consignors, the obligation should be void. The license was issued. The statement of claim also alleged that there was delivered to the Cross Company produce described therein, of the value stated, for sale on commission, and that the Cross Company did not honestly account for and handle nor make payment for the produce so delivered and did not indemnify the consignors against its fraudulent acts [fol. 118] in the handling of their produce, by reason of which the actions accrued.

An affidavit of merits and amended affidavit of merits were filed, averring in each case that the alleged bond mentioned in the statement of claim was not approved by the Director of Agriculture, as required by the act to regulate the consignment and sale on commission of farm products. The affidavit denied that the Cross Company had not honestly accounted for and handled farm products on consignment; averred that the consignor did not, within sixty days after the shipment of farm products, make demand for an accounting or payment, or file with the Director of Agriculture a copy of demand, setting forth the nature and amount of the goods consigned. It is averred that the act mentioned requires a commission merchant to keep his records for a period of six months, only, while more than nine months in one case and nineteen months in the other had elapsed since the dates of the shipments and transactions mentioned and the filing of the actions, and that the records were not then open to inspection by the plaintiff, and that the plaintiff could not state that the Cross Company did not honestly account for or make payment for the farm products delivered to it for sale on consignment.

It is averred that the act to regulate the consignment and sale on commission of farm products is unconstitutional, as a violation of the third clause of section 8 of article I of the constitution of the United States, because it is a restriction on and a regulation of interstate commerce, and that

the shipments mentioned were shipments in interstate commerce, and that the Congress of the United States had enacted a statute covering the subject matter of consignments and shipments of perishable commodities in interstate commerce, and that it supersedes the Illinois statute on the same subject matter. It is averred that the statute under which the bond was given violates the fourteenth amendment of the constitution of the United States and sections 2 and 19 of article 2 of the constitution of Illinois, providing against the taking of property without due process of law. The question presented by this last averment was not argued and is not considered.

The Cross Company solicited and received shipments of farm produce at its place of business in Chicago, which produce remained in the original packages in which it was shipped and was the property of the original consignors and sold for their account by the Cross Company on a [fol. 119] commission basis. No consignments were purchased by that company for its own account, to be re-sold by it. The produce handled by the Cross Company was shipped to Chicago from points within and without the State and was sold by it to purchasers *wherever they might* be located. Less than five percent of the produce originated in this State and the remainder was shipped from other States. The company was actively in the business for a long time prior to July 1, 1931, and until October 12, 1932, when an involuntary petition in bankruptcy was filed against it and it was thereafter adjudged a bankrupt.

During the period it was in business the Cross Company issued and mailed to the respective consignors of produce the account of sales, showing the selling price of the produce, the transportation and drayage charges, the brokerage fees and the net proceeds due the respective consignors. The shipments of farm produce alleged in the statement of claim to have been made to the Cross Company were made at the times shown in that statement and for the amounts therein appearing, and they so appear on the books of the Cross Company, but no part of the accounts has been paid to the consignors mentioned in the statement of claim.

The defendant's principal contentions are: The Commission Merchants act is unconstitutional because it restricts and imposes a burden upon interstate commerce, in violation of the Federal constitution; that the Federal Congress having undertaken to regulate interstate commerce in the

particular class of business here involved, the State legislature was deprived of the right to regulate it; that the act is unconstitutional because it delegates arbitrary power to administrative officers without rule or regulation, and is uncertain, inconsistent, incomplete and indefinite; that the provisions of the act under which the bond was exacted must be regarded as though they were incorporated in the bond, and that, the act being unconstitutional, the bond is unenforceable against both the principal and surety.

The plaintiff's contentions are: The act is within the police power of the State to prevent fraud and affects interstate commerce only incidentally and remotely and that the regulation is legal; that the State has the concurrent right with Congress to legislate with reference to agricultural products, and that the requirements of the bond are certain and enforceable.

[fol. 120] The act in question includes and covers produce such as is involved in the actions instituted. Section 2 provides that no person, firm or corporation shall receive, sell or offer for sale, or solicit consignments or shipments for sale on commission within this State, any kind of farm produce without a license as provided by the act. An application must be filed with the Director of Agriculture for a license to do a commission business in farm produce, and a payment of ten dollars and a bond are required, to be renewed each year. Section 3 provides that the bond is to secure an honest accounting and handling of produce received and for the payment therefor to the consignor. The Director of Agriculture may bring an action in any court of competent jurisdiction in the county in which the place of business of the licensee is located to recover payment for the goods sold on commission and not paid to the consignor. Section 4 gives power to the Director of Agriculture and his assistants to investigate, either upon a verified complaint of any interested person or whether or not a complaint is filed, the record of any person, firm or corporation applying for a license, or any transaction involving the solicitation, receipt, sale or attempted sale of farm produce, the failure to make proper and true accounts and settlements, the making of false statements as to market conditions with intent to deceive, or the failure to make payment for goods received or other alleged injurious transactions, and may examine the ledgers, books of account, memoranda or other documents relating to the transac-

tion involved of any commission merchant, and may take testimony. The same section provides how a consignor may proceed who has not obtained an honest accounting in any transaction. Section 5 provides that the director may decline to grant a license, or may revoke one already granted, for different causes enumerated, among which are that the licensee has failed to account promptly and properly or to make settlements, with intent to defraud. Section 7 provides that the commission merchant shall make a record of the receipt and handling of the produce, keep the record thereof for six months, and has the burden of proving the correctness of his records as to any transactions which may be questioned. Section 8 provides that any person or firm guilty of a violation of the act shall be guilty of a misdemeanor and punished by a fine of not less than $25 nor more than $500. Laws of 1919, pp. 14 to 18; Laws of 1927, pp. 6 to 8.

[fol. 121] Chapter 20 of title 7, on agriculture, of the United States Code, relating to farm produce received in interstate commerce by commission merchants and others, provides, among other things, (section 491,) that any person, firm, association or corporation receiving, among other merchandise, farm products of any kind or character in interstate commerce for or on behalf of another, who without good and sufficient cause therefor shall destroy or abandon, discard as refuse or dump any produce directly or indirectly, or through collusion with any person, or who shall knowingly and with intent to defraud make any false report or statement to the person, firm, association or corporation from whom any produce was received, concerning the condition, quality, quantity, sale or disposition thereof, or who shall knowingly and with intent to defraud fail truly and correctly to account therefor, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $100 and not more than $3000, or by imprisonment for a period not exceeding one year, or both, at the discretion of the court. Section 492 provides that the Secretary of Agriculture shall by regulation provide for the making of prompt investigations and the issuing of certificates as to the quality and condition of produce received in interstate commerce, upon application of any person, firm, association or corporation shipping, receiving or financially interested in such produce. Such regulations shall designate the classes of persons qualified and author-

ized to make such investigations and issue such certificates. By section 493 the Secretary of Agriculture is authorized and directed to enforce the provisions of the act. By section 494 the Secretary of Agriculture may make such rules and regulations as he may deem advisable to carry out the provisions of the chapter, and may cooperate with any department or agency of the government, any State, Territory, district or possession, or department, agency or political subdivision, or any person. Section 496 provides that the chapter shall not abrogate or nullify any other statute, whether State or Federal, dealing with the same subjects as chapter 20, but it is intended that all such statutes shall remain in full force and effect, except in so far as they are inconsistent with the United States act or repugnant to it. U. S. C. A. title 7, (cumulative part,) chap. 20, pp. 29, 30, 31.

Whether a State legislative act violates the commerce clause of the United States constitution and the acts of [fol. 122] Congress in pursuance thereof may involve the consideration of a variety of rules of law, applicable or not, as the special facts of a given case require. Interstate commerce is not a technical legal conception but a practical one drawn from the course of business. (Minnesota v. Blasius, 290 U. S. 1.) A State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an indirect effect upon interstate traffic. (Pennsylvania Railroad Co. v. Hughes, 191 U. S. 477, 488; Sligh v. Kirkwood, 237 id. 52; South Covington and Cincinnati Street Railway Co. v. City of Covington, 235 id. 537; Sherlock v. Alling, 93 id. 99.) In enacting police regulations the State is not bound to cover the whole field of possible abuses. (Patsone v. Pennsylvania, 232 U. S. 138, 144; People v. Monroe, 349 Ill. 270, 290.) Protection against the fraudulent acts of those entrusted with the property of others is a legitimate subject of the police power. (Hall v. Geiger-Jones Co., 242 U. S. 539.) But even in the just exercise of the police power the State may not interfere with the authority of Congress over the subject of interstate commerce, for Congress has exclusive power to make regulations on that subject, but if interstate commerce is only incidentally affected, State regulation is authorized, in pursuance of the police power, in matters of local concern. (Sligh v. Kirkwood, supra.) There is no constitu-

tional objection to regulations both by Congress and the States upon the same subject matter where there is no conflict, and the State may exercise its authority until Congress acts. (Savage v. Jones, 225 U. S. 501; Sligh v. Kirkwood, supra.) Congress will not be deemed to have superseded or excluded State action under the commerce clause unless its intention to do so has been made definite and clear. (Mintz v. Baldwin, 289 U. S. 346.) The act of Congress, the substance of which has been here stated, recognizes the right of, and authorizes the States to enact, concurrent legislation with respect to the subject matter of the act and not inconsistent therewith or repugnant thereto.

Whether a series of acts in a given case constitutes the carrying on of interstate commerce is to be determined by what is actually done. (South Covington and Cincinnati Street Railway Co. v. City of Covington, supra.) They may constitute commerce though not of an interstate nature, or they may result in interstate commerce though not yet commenced, or the interstate transportation may have [fol. 123] terminated. Merchandise which has been unloaded and stored ceases to be a subject of interstate commerce and loses its immunity from State taxation or regulation. (Nashville, Chattanooga and St. Louis Railway Co. v. Wallace, 288 U. S. 249, 266; Gregg Dyeing Co. v. Query, 286 id. 472; Hart Refineries v. Harmon, 278 id. 499; Susquehanna Coal Co. v. Mayor of South Amboy, 228 id. 665; Bacon v. Illinois, 227 id. 504, 516, 517; General Oil Co. v. Crain, 209 id. 211; Kehrer v. Stewart, 197 id. 60; Minnesota v. Blasius, supra.) Where the business, in its essential national aspect, has come to an end and the condition existing or the acts under consideration performed are local, they are not subject to regulation by the Federal government, (Schechter Poultry Corp. v. United States, 79 U. S. (L. ed.) 888,) but they are subject to regulation by the State. (Public Utilities Com. v. Landon, 249 U. S. 236.) In Hall v. Geiger-Jones Co. supra, the court decided the question with respect to the power of the State to license persons engaged in the business of selling securities in the State of Ohio to prevent fraud. The law applied to the disposition of securities within the State, and while information concerning those issued in other States and foreign countries was required to be filed, they were only affected by the requirement of one who dealt with securities in the State. Upon their transportation into the State there was

no impediment. There was no regulation or interference with them after they reached the State. There was an exaction, only, that he who disposed of them in the State should be licensed to do so, and this only that they might not appear in false character and impose an appearance of value which they did not possess. It was only an indirect burden upon them as objects of interstate commerce.

Counsel for defendant assert that the present case is within the rule announced in Swift & Co. v. United States, 196 U. S. 375, which held that when cattle were sent from a place in one State with the expectation that they will end their transit, after purchase, in another State, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce, and the purchase of the cattle is an incident of such commerce. In that case a suit was brought against a number of corporations, firms and individuals of different States alleging that they were engaged in interstate com- [fol. 124] merce in the purchase, sale, transportation and delivery, and subsequent re-sale at the point of delivery, of meats, and that they combined to refrain from bidding against each other in the purchase of cattle, to maintain a uniform price at which the meat should be sold, and to maintain uniform charges in delivering meats thus sold through the channels of interstate trade to the various dealers and consumers in other States. They thus artificially restrained commerce in fresh meats from the purchase and shipment of livestock from the plains to the final disposition of the meats to the consumers in the markets of the country. The collective effect of all the facts charged in the bill constituted commerce among the States. That decision, however, recognizes a distinction between the facts therein alleged and those involved in the conduct of a local business by commission merchants, even when that which the brokers are employed to sell is an object of commerce among the States. When the brokers are not the buyers and sellers but furnish only the facilities for sales their business affects commerce among the States only indirectly.

Hopkins v. United States, 171 U. S. 578, is cited in the foregoing decision. In this latter case an unincorporated volunteer association of men assisted individual members of the association in receiving livestock from owners in various States, in feeding and preparing their livestock for

the market, disposing of it and receiving the proceeds from purchasers. They paid the owners their proportion of the proceeds after deducting charges, expenses and advances. In deciding whether the business conducted by the association was interstate commerce the court said: "We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affects interstate commerce at all, does so only in an indirect and incidental manner? * * * The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, * * * livestock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of livestock as commission merchants * * * is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of [fol. 125] livestock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants, * * * is not the substantial factor in the case. The character of the business of defendants in this case must be determined by the facts occurring at that city [the place they conducted their business]. * * * It does not appear that the defendants are engaged in interstate commerce."

The business of the Cross Company is more like the business of an individual member of the association referred to in the case last cited than to the business of one of the defendants engaged in the meat-packing business in Chicago and other cities referred to in Swift & Co. v. United States, supra. The present case is somewhat similar to the recent case of Schechter Poultry Corp. v. United States, supra. That corporation conducted a wholesale poultry slaughter-house market in Brooklyn, New York. It purchased live poultry from commission men at markets or railroad terminals in New York City, and occasionally in Philadelphia, for slaughter and re-sale to retail poultry dealers and butchers, who in turn sold directly to consumers. Ninety-six per cent of the live poultry marketed in New York City comes from other States. Notwithstand-

ing the poultry came from other States, it was held that code provisions promulgated by the President, under congressional authority, relative to wages of employees and hours of employment, did not concern its transportation from other States. Persons employed in slaughtering and selling in local trade are not engaged in interstate commerce. Their hours of work and wages have no direct relation to interstate commerce.

The Cross Company conducted an independent business in the State of Illinois. Its agency was not confined to representing the shippers whose produce was handled in these cases. Though there was not a sale to the consignee, the produce had come to rest at its destination in Chicago, to be thereafter sold by the commission merchant or corporation on a commission basis. It had been withdrawn from the carriers and was not in transit. It had a situs in this State and no other destination was in the contemplation of the shippers. Some of the produce was in storage for a considerable period of time and substantial storage charges accrued. In one of the actions it was stipulated that apples were stored, and storage charges amount- [fol. 126] ing to $168.93 were deducted from the gross sale price. Whether any or all of the produce in the other action was placed in storage is not disclosed by the record, but it was an established practice of that company, when necessary to obtain the best selling price, to place produce in storage. The regulations provided in the act here in question had nothing to do with the shipments as such but related only to the conduct of the business to prevent fraud, and they did not operate directly to restrain or burden interstate commerce. Under these circumstances it is immaterial whether the produce remains in the original packages of the shipper or whether there has been an actual transfer by sale. The shipment was to a particular destination for the use of the consignor or that he should have the proceeds of a sale by a commission merchant. (Hart Refineries v. Harmon, supra; Bacon v. Illinois, supra; Woodruff v. Parhan, 75 U. S. 123.) That the business conducted by the Cross Company is in the nature of a local facility only indirectly affecting interstate commerce and is subject to regulation under the police power is supported by the reasoning in Hopkins v. United States, supra, and Hall v. Geiger-Jones Co. supra.

It is immaterial that the date of the institution of the suits was more than nine and nineteen months, respectively, subsequent to the time of shipments, because commission merchants are required to keep their records only six months. What the commission merchant's record contained was stipulated as a fact in this case. The six-months period for keeping the record or records was not a limitation upon the time within which an action should be commenced. Although it was averred in the amended affidavit of merits that demand was not made within sixty days after the shipment of the produce there is now no contest upon that question.

It is contended that the statute with respect to the bond required, is void because it delegates arbitrary power to administrative officers without rule or regulation, and is too indefinite where it is provided, "all bonds to be of a standard form as to terms and conditions, approved by the director, and to secure an honest accounting." Among the cases cited are People v. Beekman & Co. 347 Ill. 92, and People v. Federal Surety Co. 336 id. 472. In the former case it was held that a bond of not less than $2000 nor more than $50,000, conditioned that the principal would comply with the Securities law of the State and would conduct his [fol. 127] business so as not to work a fraud, and would make sales without material misrepresentations, and would account to persons interested for money and property received and deliver securities to purchasers or persons entitled thereto when paid for and due to be delivered, "with terms and in form to be approved by the Secretary of State," and authorizing the inclusion of other terms not specified in the act, vested discretionary power in an administrative officer without properly defining the terms under which his discretion was to be exercised, and was invalid. In People v. Federal Surety Co. supra, the bond was variant from the provisions prescribed by law and was illegal. The State, in the exercise of the police power, has authority to regulate the business and require such safeguards as are appropriate to protect customers of commission merchants against dishonesty. The requirement of a bond from commission merchants is an appropriate means of protecting those dealing with them. A statute requiring a bond constitutes a part of the bond, and it must be assumed that the bond is executed with reference to the

provisions of the statute. (Estate of Ramsay v. People, 197 Ill. 572.) It was so provided in the bonds in the present cases and they were in accordance with the provisions of the statute. The provision in the act as to the bond was that it should be in the definite and exclusive sum of $5000. All bonds were to be of a standard form as to terms and conditions, approved by the Director of Agriculture, to secure an honest accounting and handling of produce received. In the present case there was no lack of uniformity and there was no special discretion committed to the Director of Agriculture, but the standard form as to terms and conditions would be such as were in accordance with the statute. In Hall v. Geiger-Jones Co., supra, a law regulating the dealing in investment securities was under consideration. The commissioner or superintendent of banks and banking in Ohio was required to be satisfied as to the good repute in business of the applicant and named agents. It was contended that the law conferred arbitrary power upon him. It was held that the law was addressed to a complex situation. Its purpose was to give a basis for judgment of the securities offered the purchasing public, secure credit where it was deserved and confidence to investment and trading, prevent deception and save credulity and ignorance from imposition, so far as it could be done by the approved reputation of the seller of the securities, and [fol. 128] provide authoritative information. The regulation was held sufficiently definite and the discretion allowed the commissioner not arbitrary. Neither the act nor the bond in the present case is subject to the criticism offered against them. Nebbia v. New York, 291 U. S. 502, 522, 523; Payne v. State of Kansas, 248 id. 112; People v. Perrette, 253 N. Y. 305, 308, 309.

The judgment of the municipal court is affirmed.

Judgment affirmed.

[fol. 129] IN SUPREME COURT OF ILLINOIS

No. 22532

PEOPLE STATE OF ILLINOIS ex Rel. WALTER W. McLAUGHLIN, Director of Agriculture, Appellee,

vs.

G. H. CROSS COMPANY and THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, Appellants

Appeal from Municipal Court of Chicago, Municipal Court No. 2765929

JUDGMENT—Oct. 14, 1935

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment of the Municipal Court aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Judgment of the Municipal Court aforesaid be Affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

[fols. 130-138] IN SUPREME COURT OF ILLINOIS

No. 22533

PEOPLE STATE OF ILLINOIS ex Rel. WALTER W. MCLAUGHLIN, Director of Agriculture, Appellee,

vs.

G. H. CROSS COMPANY and THE HARTFORD ACCIDENT AND INDEMNITY COMPANY, Appellants

Appeal from Municipal Court of Chicago, Municipal Court No. 2765930

JUDGMENT—Oct. 14, 1935

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment of the Municipal Court aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error;

Therefore, it is considered by the Court that the Judgment of the Municipal Court aforesaid be Affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

[fols. 139-152] IN SUPREME COURT OF ILLINOIS, JUNE TERM, A. D. 1934

Consolidated Cases Nos. 22532-22533

THE PEOPLE OF THE STATE OF ILLINOIS ex Rel. WALTER W. McLAUGHLIN, Director of Agriculture (Plaintiff), Appellee,

vs.

G. H. CROSS COMPANY, a Corporation, and HARTFORD ACCIDENT & INDEMNITY Co., a Corporation, Defendants

On Appeal of Hartford Accident & Indemnity Co., a Corporation, Appellant.

Appeal from Municipal Court of Chicago

Honorable John J. Lupe, Trial Judge

ORDER OF SEVERANCE—Filed Dec. 5, 1935

It appearing to the court that G. H. Cross Company, a corporation, one of the defendants in the above entitled consolidated causes and Sam Howard, trustee in bankruptcy of G. H. Cross Company, a corporation, bankrupt, have been duly notified and requested by said Hartford Accident and Indemnity Company, a corporation, the other defendant in the above entitled consolidated causes, to join in its petition for appeal to the Supreme Court of the United States from the judgment entered herein on October 14, 1935, but have failed or refused to join therein, the said Hartford Accident and Indemnity Company, a corporation, is hereby granted the right to appeal alone, without joining said G. H. Cross Company, a corporation, as appellant.

Enter.

Clyde E. Stone, Chief Justice of the Supreme Court of the State of Illinois.

Dated December 5th, 1935.

[fol. 153] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

[Title omitted]

ORDER ALLOWING APPEAL, WITH SUPERSEDEAS AND ORDER APPROVING BOND—Filed Dec. 5, 1935

The appellant in the above entitled consolidated causes, having prayed for the allowance of an appeal in said causes to the Supreme Court of the United States from the final judgment made and entered in the above entitled causes by the Supreme Court of the State of Illinois on the 14th day of October, 1935, (no petition for re-hearing having been filed within the time prescribed by the rules of the Supreme Court of the State of Illinois, in accordance with statutes of Illinois, (Illinois Revised Statutes, 1935, Chap. [fol. 154] 110, Paragraphs 130 and 263 (5)) and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided and upon due consideration thereof and of the record;

It is ordered that said petition for appeal is hereby granted, and that the appeal be and the same is hereby allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Illinois in the above entitled consolidated causes as provided by law, upon petitioner filing a bond in the sum of Seventy Five Hundred Dollars ($7,500.00), with sufficient sureties, and conditioned as required by law, and it is hereby further ordered that the same shall operate as a supersedeas of the judgment made and entered in the above entitled consolidated causes and shall suspend and stay all further proceedings until the termination of said appeal by the Supreme Court of the United States.

It is further ordered that the Clerk of the Supreme Court of the State of Illinois shall prepare and certify a transcript of the record, proceedings and judgment in said consolidated causes and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof.

The said appellant now presenting a bond in the sum of Seventy Five Hundred Dollars ($7,500.00) with The Ætna

Casualty and Surety Company of Hartford, Connecticut, as surety, it is ordered that the said bond be and it is hereby approved.

[fols. 155-195] Dated December 5th, 1935.

Clyde E. Stone, Chief Justice of the Supreme Court of the State of Illinois.

[fol. 196] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Jan. 10, 1936

Now comes the Hartford Accident and Indemnity Company, a corporation, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The Supreme Court of Illinois in its judgment construing the statute of the State of Illinois, entitled "An act to regulate the consignment and sale on commission of farm produce", approved June 28, 1919, in force July 1, 1919, as amended (Cahill's Illinois Revised Statutes, 1933, Ch. 5, paragraphs 24 to 32), under which the bonds sued on in this case were exacted by the state authorities as a condition precedent to the obtaining of a license to engage in the interstate business regulated by said Act, committed error in that the statute as so construed by the Supreme Court of Illinois imposes a burden on interstate commerce and is therefore repugnant to the constitution of the United States, particularly Clause 3, Section 8, Article I thereof, which provides that

"The Congress shall have power

[fol. 197] First. * * *

Second. * * *

Third. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

2. The Supreme Court of Illinois in its judgment construing "An act to regulate the consignment and sale on commission of farm produce", approved June 28, 1919, in force July 1, 1919, as amended (Cahill's Illinois Revised Statutes, 1933, Ch. 5, paragraphs 24 to 32), under which the bonds

sued on in this case were exacted by the state authorities as a condition precedent to the obtaining of a license to engage in the interstate business regulated by said Act, committed error in that the statute as so construed by the Supreme Court of Illinois, is unconstitutional and void in that it imposes a burden upon interstate commerce and undertakes to regulate interstate commerce in a field in which the Congress of the United States in 1930 enacted the "Perishable Agricultural Commodities Act, 1930" (7 U. S. C. A. Secs. 551 to 568) which covers the consignment of shipments of perishable commodities in interstate commerce, and which requires a license from the Secretary of Agriculture for the same persons who are required to secure a state license under said State Statute, being the same subject matter as that covered by the said Act of the State of Illinois, thereby superseding said state act.

3. The Supreme Court of Illinois in its judgment construing the statute of the State of Illinois, entitled "An Act to regulate the consignment and sale on commission of farm produce" approved June 28, 1919, in force July 1, 1919, as amended (Cahill's Illinois Revised Statutes, 1933, Ch. 5, [fol. 198] paragraphs 24 to 32), under which the bonds sued on in this case were exacted by the state authorities as a condition precedent to the obtaining of a license to engage in the interstate business regulated by said Act, committed error in holding that such bonds so exacted as aforesaid were valid and enforceable as against the appellant, as surety, as well as against the principal, and in failing to hold that they were void and unenforceable as having been exacted under a state statute which is repugnant to the constitution of the United States, particularly Clause 3, Section 8, of Article I thereof.

Appellant further states that only the following parts of the record, as filed in this court, are deemed necessary to be printed for the consideration of the points set forth above, viz.:

Title of paper	Record page
Statements of claims and exhibits thereto attached	6– 10; 85 –91
Affidavits of Merits	20– 22; 91B –91E
Amended Affidavits of Merits	26– 28; 92 –94
Orders Consolidating Cases	29, 114
Stipulation of Facts	72– 77

(Note.—Exhibits A and B attached to Stipulation of Facts are the same as Exhibits A attached to each of the Statements of Claim)

Judgments of Municipal Court 34, 95
Opinion of Supreme Court of Illinois 117–128
Judgment of Supreme Court of Illinois 129–130
Order of Severance 139

Counsel for Appellant: J. F. Dammann, Sidney K. Jackson, 120 West Adams Street, Chicago, Illinois; Arthur L. Israel, 38 South Dearborn Street, Chicago, Illinois. Of Counsel: Wilson & McIlvaine, 120 West Adams Street, Chicago, Illinois; Arthur L. Israel, 38 South Dearborn Street, Chicago, Illinois.

[fol. 199] Receipt is hereby acknowledged of a true and correct copy of the above and foregoing Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed this 7th day of January, A. D. 1936.

Otto Kerner, Attorney General of the State of Illinois, Attorney for Appellees, by Louis Salinger, Assistant Attorney General of the State of Illinois.

[fol. 200] [File endorsement omitted.]

Endorsed on cover: File No. 40,246. Illinois Supreme Court: Term No. 692. Hartford Accident & Indemnity Company, appellant, vs. The People of the State of Illinois, ex rel. Walter W. McLaughlin, Director of Agriculture. Filed January 10, 1936. Term No. 692, O. T., 1935.

(7458-C)

FILE COPY

FILED
JAN 10 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 692

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

J. F. DAMMANN,
ARTHUR L. ISRAEL,
SIDNEY K. JACKSON,
Counsel for Appellant.

WILSON & McILVAINE,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
The Illinois statute, the validity of which is involved	2
Date of the judgment sought to be reviewed and date upon which application for appeal was presented	7
The nature of the case and the rulings in the court below	7
Cases believed to sustain jurisdiction	12
Appendix "A"	14
Appendix "B"	20

Table of Cases Cited.

Appleby v. City of New York, 271 U. S. 364	12
Alpha Cement Co. v. Massachusetts, 268 U. S. 203	13
Alabama Railway Co. v. Jackson Ry. Co., 271 U. S. 241	12
Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218	12
Bryant v. Zimmerman, 278 U. S. 63	13
Constable v. National Steamship Co., 154 U. S. 51	12
Cook v. Pennsylvania, 97 U. S. 566	13
Detroit International Bridge Co. v. Corporation Tax Appeals Board, 287 U. S. 295	13
Hanover Ins. Co. v. Harding, 272 U. S. 494	12
Knights of Pythias v. Meyer, 265 U. S. 30	12
People v. Beekman, 347 Ill. 92	12
People v. Federal Surety Co., 336 Ill. 472	12
People ex rel., etc., v. G. H. Cross Company et al., 361 Ill. 405, 198 N. E. 356	7
Southern Ry. Co. v. Kentucky, 274 U. S. 76	12
Sprout v. City of South Bend, 277 U. S. 163	12
United States v. Tingey, 5 Pet. 115	12
Ward & Gow v. Krinsky, 259 U. S. 503	12

Statutes Cited.

Act of Congress of January 31, 1928 (Ch. 14, 45 Stat. 54, 28 U. S. C. A. 861a)	2
Act of Congress of April 26, 1928 (Ch. 440, 45 Stat. 466, 28 U. S. C. A. 861b)	2
Act of the Illinois Legislature entitled "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named," (Ill. Session Laws of 1919, page 14; Ill. Revised Stat. 1935, Chap. 5, paragraphs 24-32, pages 75-77), Section 1 (Par. 24 of the Ill. Revised Statutes)	2, 3

Page

Section 2 (Par. 25 of the Ill. Revised Statutes) 3
Section 3, as amended by the Session Laws of 1927, page 6 (Par. 26 Ill. Revised Statutes) 4
Section 4, as amended by the Session Laws of 1927, page 6 (Par. 27, Ill. Revised Statutes) 4
Section 5 (Par. 28, Ill. Revised Statutes) 5
Section 6 (Par. 29, Ill. Revised Statutes) 5
Section 7 (Par. 30, Ill. Revised Statutes) 5
Section 8, as amended by the Session Laws of 1927, page 6 (Par. 31, Ill. Revised Statutes) 5
Constitution of the United States, Article I, Section 8, Clause 3 6
Judicial Code, Section 237, as amended (28 U. S. C. A. 344) 2
"Perishable Commodities Act of 1930," 46 Stat. 531 7

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1935

No. 692

HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

CONSOLIDATED CAUSES.

Nos. 22532-22533.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE,
(*Plaintiff*) *Appellee.*

vs.

G. H. CROSS COMPANY, A CORPORATION, AND HARTFORD ACCIDENT & INDEMNITY COMPANY, A CORPORATION,
Defendants.

ON APPEAL OF HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION,
Appellant.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

1*h*

A.

Statutory Provisions Sustaining Jurisdiction.

This appeal involves the sole question whether a certain act of the legislature of the State of Illinois, as interpreted and applied by the highest court of the State, is violative of the Commerce Clause of the Federal Constitution. Hence the jurisdiction of this Court on appeal is invoked by reason of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344), having reference to appellate jurisdiction of the decrees of State courts by writ of error:

> "• • • where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

And the Act of January 31, 1928 (Ch. 14, 45 Stat. 54; 28 U. S. C. A., Sec. 861a) abolishing the writ of error and providing that all relief which theretofore could be obtained by writ of error shall thereafter be obtainable by appeal, and by the Act of April 26, 1928 (Ch. 440, 45 Stat. 466; 28 U. S. C. A., Sec. 861b) with reference to such appeals.

B.

The Illinois Statute, the Validity of which is Involved.

The Illinois statute, the validity of which is involved, is entitled "An Act to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named." (Ill. Session Laws of 1919, page 14; Ill. Revised Stat. 1935, Chap. 5, paragraphs 24-32, pages 75-77.)

A full copy of the Act is attached hereto as appendix "A", and for convenience we submit the following summary:

Section 1 (Par. 24 of the Ill. Revised Statutes) undertakes to define the term commission merchant as including every one, whether person or corporation, licensed under the Act to receive, sell or offer for sale on commission

"within this state"

of practically any kind of farm produce. The farm produce is defined so as to include in it practically everything of that general nature.

Section 2 (Par. 25 of Ill. Revised Statutes) prohibits any one from entering into business as a commission merchant without a license. It provides:

> "No person, firm, exchange, association or corporation, shall receive, sell or offer for sale, or solicit, consignments or shipments for sale on commission *within this State* any kind of farm produce, without a license as provided in this Act." (Italics ours.)

It requires a person or corporation seeking a license to apply to the State Director of Agriculture and in his application to state the kinds of farm produce proposed to be handled, the name he proposes to use, and if a firm, the name of the officers, and the name of the local agent, address, etc., and that

> "Such applicant shall further satisfy the Director of his or its character, responsibility and good faith in seeking to carry on a commission business."

It is then provided that the Director of Agriculture shall issue the license upon the payment of ten dollars *and the execution and delivery of a bond* as later provided for. The license permits the applicant to conduct a commission business at the place named until the succeeding first of July. Separate licenses and bonds are required for each location. The license must be posted in the office of the commission merchant.

Section 3, as amended by the Session Laws of 1927, page 6 (Par. 26, Ill. Revised Statutes) provides that before any such license shall be issued the applicant *must* execute and deliver to the Director of Agriculture an indemnity bond in the amount of $5,000, with surety satisfactory to the Director. With reference to the bond it is provided:

> "All bonds to be of a standard form as to terms and conditions, approved by the director, and to secure an honest accounting and handling of produce received, and for the payment to the consignor of all moneys or things of value received for goods consigned to such licensee for sale and to secure consignor against all fraudulent acts of said licensee in the sale or the handling of the goods of consignor."

It is then provided that the Director may bring an action in the appropriate court to recover on behalf of the consignor for the goods sold on commission and not properly accounted for, and for any damages that might have been sustained by the consignor.

In Section 4, as amended by the Session Laws of 1927, page 6 (Par. 27, Ill. Revised Statutes) the Director of Agriculture is given the power to investigate complaints and to investigate irrespective of complaints, the records and business of the applicant, his failure to make proper and true accounts at regular intervals, whether false statements were made as to condition, quality and quantity of goods received, his statements as to market conditions, and "other alleged injurious transactions".

For the purpose of such investigation the books and records of a commission merchant may be examined by the Director of Agriculture and testimony may be taken under oath.

The section further sets up the mechanism whereby the consignor who has not been paid may make a complaint to the Director of Agriculture, and the Director may investi-

gate and conduct a hearing, and upon such hearing make findings of fact. On these findings he may either dismiss the complaint or revoke the license and bring action on the bond.

Section 5 (Par. 28, Ill. Revised Statutes) provides that the Director may refuse to grant a license or revoke one already granted "where he is satisfied of the existence of the following cases, or any of them." Then follows a list of cases, including false charging, failure to account promptly, false statements as to condition, quality and quantity of goods received, false or misleading statements as to market conditions, combinations to fix prices, or where the commission merchant directly or indirectly purchases goods for his own account without authority, where commission merchant is in bankruptcy, or the Director believes that bankruptcy may shortly occur, or where a continued course of dealing is of such a nature as to satisfy the Director of the inability of the licensee to properly conduct the business of a commission merchant, or of intent to deceive or defraud shippers, or where there has been fraud or deception in obtaining the license, or where a new bond is not filed when the old one is held unsatisfactory.

Section 6 (Par. 29, Ill. Revised Statutes) provides for a court review of the action of the Director in refusing to grant or in revoking a license. The license remains in full force pending the appeal.

Section 7 (Par. 30, Ill. Revised Statutes) requires that the commission merchant must keep very full records of all goods received and sales made, and shall retain these records for six months after the sales for the inspection of the Director. The burden of proving the correctness of the records is put on the commission merchant.

Section 8, as amended by the Session Laws of 1927, page 6 (Par. 31, Ill. Revised Statutes) provides that any person

guilty of any one of the listed violations of the Act is guilty of a misdemeanor and subject to a fine of from twenty-five to five hundred dollars. Among the listed violations are a failure to comply with the Act in every respect, and advertising or holding of one's self out as a commission merchant without a license.

The Illinois State authorities interpreted this Act not merely to regulate or require the licensing of the commission merchant business carried on entirely within the State of Illinois, but to regulate and license the business of any commission merchant located in the State in soliciting, receiving and handling on consignment and commission of farm produce to be shipped in, and actually shipped in, from outside the State of Illinois (see stipulation of Facts, 4, 5). In fact in the trial it was stipulated (see paragraphs 4 and 5) that the State authorities insisted that even if a commission merchant were engaged solely and exclusively in soliciting, receiving and handling on consignment and commission farm produce shipped in from outside the State, the Act was mandatory that such a person secure a bond and license before engaging in that business, and that in carrying on the business he submit to the regulations stipulated by the statute.

And in pursuance of this interpretation the Director of Agriculture exacted a license and bond from the G. H. Cross Company, and upon the failure of the Cross Company to pay for certain consignments brought suit on the bonds on account of shipments from outside the State. And the judgments here appealed from are to recover in one case entirely, and in the other case almost entirely, on account of shipments from outside the State.

The defendant upon its first appearance in court raised the constitutional objection that the Act was violative of Article 1, Section 8, Clause 3 of the Constitution of the United States, in that it imposed a restriction on regula-

tion of interstate commerce. Further, that the Congress of the United States in 1930, prior to the exaction of the bond and license, enacted a statute entitled "The Perishable Commodities Act of 1930", 46 Stat. 531, which covers the subject matter of shipments in interstate commerce of perishable commodities, being the same subject matter covered by the Act of the State of Illinois in question as interpreted by the State authorities. (See original affidavits of merits of the defendant, paragraphs 6, 7 and 8. See also amended affidavit of merits, paragraphs 6, 7, 8, 9 and 10.)

The Supreme Court of the State held (See for its opinion *People ex rel., etc.*, v. *G. H. Cross Company et al.*, 361 Ill. 405; 198 N. E. 356) that the act as so interpreted was not in violation of the commerce clause of the Federal constitution, and affirmed the judgments.

C.

Date of the Judgment Sought to be Reviewed and Date upon which Application for Appeal was Presented.

The judgment of the Supreme Court of Illinois, which is sought to be reviewed, was entered on October 14, 1935.

No petition for rehearing was filed within the time provided by the rules of said court (Rule 44). The application for appeal to the United States Supreme Court was presented to the Supreme Court of Illinois and allowed on December 5, 1935.

D.

The Nature of the Case and the Rulings in the Court Below.

The two original suits, later consolidated and tried as one, were brought by the State Director of Agriculture against the G. H. Cross Company and the Hartford Accident & Indemnity Company upon two bonds which covered

two successive years, and which had by color of statute been exacted of the G. H. Cross Company, a corporation regularly engaged in the commission business, as a condition precedent to the issuance of a license to continue in that business.

In the trial of the consolidated cases the facts were stipulated to, and it was also agreed that the facts so stipulated to insofar as they related to the G. H. Cross Company, the construction of the statute by State authorities, and the exaction of the licenses and bonds under the statute in that company's case, applied equally as well to all other persons, firms or corporations in the City of Chicago who solicited, received and handled farm produce for sale on commission (see par. 6 of Stipulation). In other words, the cases were tried to test the question whether the Act in question was constitutional.

The following is a summary of the agreed facts:

The G. H. Cross Company was a corporation of the State of Illinois engaged in the business of soliciting, handling and receiving farm produce. (Paragraph 1 of Stipulation.) All of the farm produce received and handled by it was sold in the original packages as received from the consignors and remained the property of the consignors until sold, and no consignments were purchased by the G. H. Cross Company for its own account and resold by it (paragraphs 1 and 2 of Stipulation).

The Cross Company's business involved the soliciting and handling of consignments not only from consignors in Illinois, but also from consignors outside of the State. In fact, the business represented by consignments from Illinois consignors amounted to less than five per cent of the total volume. Ninety-five per cent of the total volume originated from without and was shipped into the State (paragraph 2 of Stipulation).

The functions of the Cross Company on such transactions were to solicit the consignments, handle them, care for the produce, sell it and account to the consignor.

The G. H. Cross Company could not have continued in business by only handling farm produce originating in Illinois; the shipments from without the State enhanced and increased its business greatly, yet it was necessary to handle some intrastate shipments at certain times (paragraph 3 of Stipulation).

Construing the Act as they did to cover the entire commission business, both intrastate and interstate consignments, the State authorities demanded, and the G. H. Cross Company under compulsion and in order to protect itself from prosecution and the serious penalties prescribed by the statute, made its applications for licenses and secured and delivered the bonds in question, executed by it as principal and the Hartford Accident & Indemnity Company as surety.

One bond covered the period from July 1, 1931, to July 1, 1932; the other from July 1, 1932, to July 1, 1933. They were identical in form and recited that the Cross Company had applied for a license as a commission merchant under the statute in question, and were conditioned that the Cross Company would "honestly account for and handle all the produce received and * * * make payment to the consignors thereof of all moneys or things of value received for goods consigned to said principal for sale, and * * * indemnify and keep indemnified said consignors from and against all fraudulent acts of said principal in the sale or handling of the goods of said consignors, and * * * keep, perform and abide by all the terms, conditions and provisions of said act and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance thereof * * *." A copy of the full text of

one of said bonds is for convenience hereto attached as Appendix "B."

The Cross Company became bankrupt (paragraph 9 of Stipulation) and failed to account to a number of consignors whose goods had been shipped in, handled and sold on commission by it. Thereupon the suits in question were brought by the Director of Agriculture on account of such consignors, and their names, places of residence, places of shipments, amounts of goods, prices, etc., were set forth in the statements of claim filed by him in said suits respectively.

In the suit on the first bond there was involved but one shipment, *which was entirely interstate.* It was a shipment of apples in a carload lot from the State of Washington on consignment to the Cross Company to be handled by said Cross Company on a commission basis (paragraph 12 of Stipulation). The suit was to recover on the bond the price of the carload lot, less certain charges.

The suit involving the second bond was for the amount of shipments made from a great number of different points throughout the United States. All of the shipments were on consignment to the Cross Company. Some of them were made from points in Illinois, but a large majority were made from points outside of the State. The total of the shipments from outside of the State was $13,513.59, and from within the State $382.55 (see tabulation of shipments in statement of claim in suit number 2765930 of the Municipal Court, and 22533 of the Supreme Court). Here, too, the suit was to recover on the bond the price of the shipments from without the State as well as those from within the State.

In both cases the defendant maintained that the bonds were void and unenforceable as being exacted under compulsion of the State statute, which was as construed by the State authorities unconstitutional.

In this connection the defendant's contention was:

That if the language "within this State" is construed, as the Supreme Court of Illinois has construed it, so as to require that a commission merchant located within the State of Illinois must have a State license before he can engage in the business of soliciting consignments or shipments from producers located outside of the State, then the statute is a restriction on and a regulation of interstate commerce and operates directly to restrain or burden interstate commerce.

That if the bond provision in the statute is construed so as to require of a commission merchant engaged in the business of soliciting and handling consignments and shipments from outside of the State of Illinois, that he furnish a bond as a condition precedent to his entering into that business, then this provision is a direct burden upon interstate commerce and a direct regulation of interstate commerce.

That it is to be especially noted that this act is not an imposition of a tax or regulation upon the *goods* but is a regulation of the *business of dealing in* those goods in interstate commerce.

That if the requirement as to a license applies to shipments from without the State, every provision of the statute operates to hinder, restrain and burden that interstate commerce.

That if the bond provisions are construed to cover shipments from outside the State, the expense of those provisions and the provisions themselves operate to burden and restrain interstate commerce.

That the statute when so construed being unconstitutional, the application for the license exacted under it and the bond demanded and delivered under its compulsion, are void and of no effect as to interstate shipments.

That on the strength of prior decisions of the Supreme

Court of the State of Illinois (which are also in accord with the decisions of this Court) the fact that the bond was so executed and delivered by the Cross Company, as principal, and Hartford Accident & Indemnity Company, as surety, is not a waiver of the right of either to contend that the statute requiring an application for a license and the furnishing of a bond was unconstitutional, and that the exaction of the bond was illegal and void and unenforceable as to interstate commerce shipments. (*People* v. *Federal Surety Co.*, 336 Ill. 472; *People* v. *Beekman*, 347 Ill. 92; *United States* v. *Tingey*, 5 Pet. 115; *Constable* v. *National Steamship Co.*, 154 U. S. 51, at 78.)

The Supreme Court of the State in giving its decision did not hold that there was any waiver of the right of the defendant to raise the constitutional question involved, and in this followed the law laid down in the decisions cited, but did hold that the statute as so construed by the State authorities was not in violation of the commerce clause of the Federal Constitution.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Knights of Pythias v. *Meyer*, 265 U. S. 30.
Appleby v. *City of New York*, 271 U. S. 364.
Ward & Gow v. *Krinsky*, 259 U. S. 503.
Hanover Ins. Co. v. *Harding*, 272 U. S. 494.
Alabama Railway Co. v. *Jackson Ry. Co.*, 271 U. S. 241.
Southern Ry. Co. v. *Kentucky*, 274 U. S. 76.
Sprout v. *City of South Bend*, 277 U. S. 163.
Anglo-Chilean Nitrate Sales Corp. v. *Alabama*, 288 U. S. 218.

Detroit International Bridge Co. v. *Corporation Tax Appeals Board,* 287 U. S. 295.
Bryant v. *Zimmerman,* 278 U. S. 63.
Alpha Cement Co. v. *Massachusetts,* 268 U. S. 203.
Cook v. *Pennsylvania,* 97 U. S. 566.

We therefore respectfully submit that this Court has jurisdiction.

J. F. Dammann,
Arthur L. Israel,
Sidney K. Jackson,
Attorneys for Appellant.

Wilson & McIlvaine,
Of Counsel.

120 W. Adams St.,
Chicago, Illinois.

APPENDIX "A".

STATE OF ILLINOIS.

Henry Horner, Governor.

Commission Merchants Law.

[Seal of the State of Illinois. Aug. 26th, 1818.]

Enforced by the Division of Foods and Dairies of the Department of Agriculture.

Walter W. McLaughlin, Director, Department of Agriculture.

Horace I. Lepman, Superintendent, Division of Foods and Dairies.

Edward F. Gerrity, Assistant Superintendent.

228 S. Wabash Avenue, Chicago.

April, 1934.

Commission Merchants Law.

Smith Hurd, Chap. 5, Sec. 17-24.

Cahill, Chap. 5, Sec. 24-32.

AN ACT *to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named.* (Approved June 28, 1919, as amended.)

Terms Defined.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* (a) That the term commission merchant shall include every person, firm, exchange, association and corporation licensed under this Act to receive, sell or offer for sale on commission, within this State, any kind of farm produce; except where such farm produce is sold for consumption and not for resale. This Act shall not apply to the sale of farm

produce at public auction by a duly licensed and bonded auctioneer, acting as the agent of another to whom such farm produce shall have been consigned; nor shall this Act apply to seeds sold at retail; nor shall this Act apply to grains and seeds which are classified into grades by any governmental or State Department duly created by any law of the State of Illinois or of the United States.

(b) The term "Farm Produce" shall include all agricultural, horticultural, floricultural, vegetable and fruit products of the soil, and poultry, wool, feathers, fur, hides, eggs, dairy products, nuts and honey, but shall not include timber products, tea or coffee.

(c) The word "Director" when used herein shall have reference to the Director of Agriculture.

License—Application—Fee.] § 2. On and after August first, Nineteen Hundred and Nineteen, no person, firm, exchange, association or corporation, shall receive, sell or offer for sale, or solicit consignments or shipments for sale on commission within this State, any kind of farm produce, without a license as provided in this Act. Every person, firm, exchange, association and corporation in this State receiving farm produce for sale on commission shall, annually, on or before June 1st, file an application with the Director of Agriculture for a license to do a commission business in farm produce. Such applicant shall state the kind or kinds of farm produce which the applicant proposes to handle, the full name of the person, firm, exchange, association or corporation applying for such a license, and if the applicant be a firm, exchange, corporation or association, the full name of each member of the firm, or the names of the officers of the exchange, association or corporation, and the name of the local agent of the exchange or association, and the city, town or village and street number at which the business is to be conducted. Such applicant shall further satisfy the Director of his or its character, responsibility and good faith in seeking to carry on a commission business. The Director shall thereupon issue to such applicant, on payment of ten ($10) dollars and the execution and delivery of a bond as hereinafter provided,

a license entitling the applicant to conduct the business of receiving and selling farm produce on commission at the place named in the application until the first day of July of the year next following. Separate licenses and bonds shall be required for each location at which business is to be conducted; and such license shall be kept posted in the office of such licensee.

Applicant to Give Bond—Who May Bring Action.] § 3. Before any such license shall be issued every applicant shall execute and deliver to the Director of Agriculture an indemnity bond for five thousand ($5,000.00) dollars and with sureties satisfactory to the said Director. All bonds to be of a standard form as to terms and conditions, approved by the Director, and to secure an honest accounting and handling of produce received and for the payment to the consignor of all moneys or things of value received for goods consigned to such licensee for sale and to secure consignor against all fraudulent acts of said licensee in the sale or the handling of the goods of consignor. And the Director may bring an action in any court of competent jurisdiction in the county in which is situated the place of business of the licensee to recover payment for goods sold on commission and not paid to consignor, or not honestly accounted for, and for damages sustained by consignors by reason of such fraudulent acts and wrongful handling and if such licensee has become liable to more than one consignor, and the amount of the bond is insufficient to pay the entire liability, the consignors shall be compensated in proportion to their several claims, the said sums when collected to be promptly paid over to the parties entitled thereto. [As amended by Act approved June 29, 1927.]

Investigation—Notice of Hearing.] § 4. The Director of Agriculture or his assistants shall have power to investigate, upon the verified complaint of an interested person, also to make an investigation irrespective of whether or not a complaint is filed, the record of any person, firm, exchange, corporation or association applying for a license, or any transaction involving the solicitation, receipt, sale or attempted sale of farm produce on a commission basis,

the failure to make proper and true accounts and settlements at prompt and regular intervals, the making of false statements as to condition, quality or quantity of goods received or while in storage, the making of false statements as to market conditions, with intent to deceive, or the failure to make payment for goods received or other alleged injurious transactions; and for such purpose may examine at the place of business of the licensee, that portion of the ledgers, books of account, memoranda or other documents, relating to the transactions involved, of any commission merchant, and may take testimony therein under oath.

When a consignor of farm produce fails to obtain honest accounting in any transaction he shall within sixty (60) days after the shipment of the goods make a demand upon the consignee for either an honest accounting or payment for goods shipped. Ten days after making this demand, if an honest accounting or payment has not been received by the consignor, he shall file with the Director a copy of this demand together with an affidavit setting forth the nature and amount of the goods consigned, the date of the consignment, and the amount he believes to be due and owing him, together with bills of lading and delivery receipts showing the goods were shipped to and received by the consignee. The Director shall attempt to secure an explanation or adjustment; failing this, within seven days after receipt of such complaint from consignor, he shall cause a copy thereof, together with a notice of a time and place for a hearing on such complaint, to be served personally or by mail upon such commission merchant. Such service shall be made at least seven days before the hearing, which shall be held in the city, village or township in which is situated the place of business of the licensee. At the time and place appointed for such hearing, the Director or his assistants shall hear the parties to such complaint, shall have power to administer an oath, and shall enter in the office of the Director at Springfield, a decision either dismissing such complaint or specifying the facts which he deems established on such hearing, and in case such facts are established as cause him to revoke such license, he shall bring an action on the bond within sixty

days of the filing of such decision. (As amended by Act approved June 29, 1927.)

Refusal or Revocation of License.] § 5. The Director may decline to grant a license or may revoke a license already granted where he is satisfied of the existence of the following cases or any of them.

(a) Where false charges have been imposed for handling or services rendered.

(b) Where there has been a failure to account promptly and properly or to make settlements, with intent to defraud.

(c) Where there have been false statements as to condition, quality or quantity of goods received or held for sale on commission when the same might be known on reasonable inspe[illegible]

(d) Where the[illegible] has been false or misleading statement or statements as to market conditions with intent to deceive.

(e) Where there has been a combination or combinations to fix prices.

(f) Where the commission merchant directly or indirectly purchases the goods for his own account without prior authority therefor or without notifying the consignor thereof.

(g) Where the commission merchant is in bankruptcy or in insolvency, or where the Director has reason to believe that bankruptcy or insolvency may shortly occur.

(h) Where there has been a continued course of dealing of such a nature as to satisfy the Director of the inability to properly conduct the business of commission merchant, or of the intent to deceive or defraud shippers.

(i) Where a licensee has been guilty of fraud or deception in obtaining his license.

(j) Where the licensee neglects to file a new bond when notified by the Director that the bond already filed is unsatisfactory.

Action Subject to Review.] § 6. The action of the Director in refusing to grant a license, or in revoking a license granted under this Act, shall be subject to review by a writ of certiorari, and if such proceedings are begun, until the final determination of the proceedings and all appeals therefrom, the license of such commission merchant shall be deemed to be in full force and effect, provided the fees for such license shall have been paid and a bond given as herein required.

Commission Merchant to Keep Record of Produce.] § 7. Every commission merchant shall, upon the receipt of farm produce, and as he handles and disposes of the same, make a record thereof, specifying the name and address of the consignor, the date of receipt, the kind and the quantity of such produce, the condition of the goods upon receipt by licensee, the amount of goods sold, the date of sale, the name and address of the person to whom the goods are sold, his license number where the same can be secured with reasonable diligence, the price received and the items of expense connected therewith; and a memorandum of this record except as to the names and addresses of purchasers of such goods, together with payment in settlement for such shipment, shall be mailed to the consignor within forty-eight hours unless otherwise agreed. The commission merchant shall retain the foregoing record for a period of six months and the same shall be open to the inspection of the Director or his agents. The burden of proof shall be upon the commission merchant to prove the correctness of his records as to any transactions which may be questioned.

Penalty.] § 8. Any person, firm, exchange, association or corporation who shall receive or offer to receive, sell, or offer to sell on commission within this State any kind of farm produce without a license except as in this Act permitted and any person who being a commission merchant in farm produce shall (a) impose false charges for handling or services in connection with farm produce, or (b) fails to account for such farm produce promptly and properly and to make settlements thereof, with intent to defraud, or (c) shall make false or misleading statement or

statements as to market conditions with intent to deceive, or, (d) enter into any combination or combinations to fix prices, or (e) directly or indirectly purchases for his or its own account, goods received by him or it upon consignment without prior authority therefor from the consignor, or shall fail to promptly notify the consignor of such purchase on his or its own account, or (f) any person handling, shipping or selling farm produce who shall make false statements as to grade, condition, markings, quality or quantity of goods shipped, or packed in any manner, with intent to deceive, or (g) shall fail to comply in every respect herewith, or (h) shall advertise or hold one's self out as a commission merchant in farm produce without a license, shall be guilty of a misdemeanor, and punished by a fine of not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars.

All fines imposed and collected under this Act shall be paid within thirty days after such collection to the Department of Agriculture and by it paid into the State treasury. (As amended by Act approved June 29, 1927.)

Additional copies of this booklet may be secured by addressing the Division of Foods and Dairies, 228 S. Wabash Ave., Chicago.

APPENDIX "B".

Know All Men by These Presents:

That we The G. H. Cross Company, as Principal, and Hartford Accident and Indemnity Company, as Surety, are held and firmly bound unto the People of the State of Illinois in the sum of five thousand ($5,000.00) dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

In Witness Whereof we have hereunto set our hands and seals this 1st day of July, A. D. 1932.

The Condition of the Above Obligation is Such that if

the above bounden principal, who has applied or is about to apply to the Director of Agriculture of the State of Illinois for a license to engage in the business of receiving farm produce for sale on commission until the first day of July, 1933, at 70-72 South Water Market, Chicago, Illinois, in the City of ——, pursuant to the provisions of "An Act to regulate the consignment and sale on commission of farm produce," approved June 28, 1919, in force July 1, 1919, as amended, and who has procured to be furnished this bond in accordance with the provisions of said Act, shall honestly account for and handle all the produce received, and shall make payment to the consignors thereof of all moneys or things of value received for goods consigned to said principal for sale, and shall indemnify and keep indemnified said consignors from and against all fraudulent acts of said principal in the sale or handling of the goods of said consignors, and shall keep, perform and abide by all the terms, conditions and provisions of said Act, and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance thereof, then this obligation shall be void; otherwise to be and remain in full force and effect.

THE G. H. CROSS COMPANY, *Pres.* [SEAL.]
ROBERT L. BERNER, *Secy.*
HARTFORD ACCIDENT & INDEMNITY COMPANY, [SEAL.]
By WARD W. WELLAR, *Attorney-in-fact.* [SEAL.]

STATE OF ILLINOIS,
Cook County, ss:

I, Gilbert J. Boie, a Notary Public in and for the County and State aforesaid, do hereby certify that G. H. Cross and Robert F. Berner, who are each personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the purposes therein set forth.

GILBERT J. BOIE,
Notary Public.

[Endorsed:] Bond. "An Act to regulate the consignment and sale on commission of farm produce."—Approved June 28, 1919, in force July 1, 1919. Of ——; to People of the State of Illinois. Approved as to form: —— ——, superintendent Division of Foods and Dairies. Approved: —— ——, Director Department of Agriculture.

(7346-C)

FILE COPY

Office Supreme Court, U.S.
FILED
MAR 21 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1935)

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE APPELLANT.

J. F. DAMMANN,
120 West Adams Street,
Chicago, Illinois,
ARTHUR L. ISRAEL,
38 South Dearborn Street,
Chicago, Illinois,
SIDNEY K. JACKSON,
120 West Adams Street,
Chicago, Illinois,
Attorneys for the Appellant.

WILSON & McILVAINE,
120 West Adams Street,
Chicago, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	Page
Jurisdiction	2
Statement:	
The question involved and the proceedings in the trial court and Supreme Court of Illinois	2
The facts	3
Comparative Summary of Federal and Illinois Statutes	7
Specification of Errors Relied on	14
Summary of Argument	15
Argument:	
I. The Shipment of farm produce from outside the State of Illinois on consignment to the Cross Company in Illinois, as well as the sales of those goods on behalf of the owner, were all transactions constituting interstate commerce. And the part played by the commission merchant in that transaction is so important and vital in and of itself that the attempt to regulate it by this state statute imposes a direct and substantial burden on interstate commerce, and is therefore void	18
II. The action of Congress in regulating and licensing the business of commission merchants engaged in interstate shipments is a conclusive showing that the functions performed by a commission merchant is an essential part of the interstate commerce transaction. Hence the state act undertaking to license those functions is a direct burden on the interstate commerce transaction, and is void	31
III. Congress having undertaken to license and regulate the business of commission merchants handling perishable agricultural commodities in interstate commerce, any state statute attempting to do the same is unconstitutional and void under the commerce clause of the constitution	37

IV. The provisions of the commission merchants act under which this bond was exacted must be regarded as though they were incorporated in the bond. That act being unconstitutional and void, the bond is void and unenforceable as against the surety as well as the principal..... 46

Illinois Statute.....Appendix A

Federal Statute.....Appendix B

CASES CITED.

Baldwin v. G. A. F. Seelig, 294 U. S. 511..... 21

Bedford Company v. Stone Cutters Association, 274 U. S. 37..... 20

Brown v. Maryland, 12 Wheaton 419, 25 U. S. 554..... 27

Chicago Board of Trade v. Olsen, 262 U. S. 1..... 33

Constable v. National Steamship Company, 154 U. S. 51, 77 49

Corson v. Maryland, 120 U. S. 502..... 26

Crutcher v. Kentucky, 141 U. S. 47..... 25

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282..... 24

Di Santo v. Pennsylvania, 273 U. S. 34..... 23

Estate of Ramsey v. People, 197 Ill. 572..... 46

Federal Trade Commission v. Pacific Paper Assn., 273 U. S. 52..... 25

Furst v. Brewster, 282 U. S. 493..... 25

Hall v. Geiger-Jones, 242 U. S. 539..... 43

Hopkins v. United States, 171 U. S. 578..... 18

Lemke v. Farmers Grain Co. 258 U. S. 50..... 26

Local 167, International Brotherhood of Teamsters, etc. v. United States, 291 U. S. 293..... 29

Minnesota v. Blasins, 290 U. S. 1 27
Mintz v. Baldwin, 289 U. S. 346 42
Moses v. United States, 166 U. S. 571 49
Napier v. Atlantic Coast Line, 272 U. S. 605 40
Oregon-Washington Co. v. Washington, 270 U. S. 87 37
Paul v. Virginia Insurance, 8 Wall. 168 33
Pennsylvania Railroad v. Public Service Commission, 250 U. S. 566 38
People v. Beekman & Co. 347 Ill. 92 48
People v. Federal Surety Co. 336 Ill. 472 46
Real Silk Hosiery Mills v. Portland, 268 U. S. 325 23
Robbins v. Shelby County Taxing District, 120 U. S. 489 26
Sanitary District v. United States, 266 U. S. 405 38
Savage v. Jones, 225 U. S. 501 43
Schechter Poultry Corporation v. United States, 295 U. S. 495 28
Shafer v. Farmers Grain Co. 268 U. S. 189 34
Sligh v. Kirkwood, 237 U. S. 52 43
Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439 38
Stafford v. Wallace, 258 U. S. 495 ..... 20, 32
Stockard v. Morgan, 185 U. S. 27 20
Texas Transportation Co. v. New Orleans, 264 U. S. 150 22
Ware and Leland v. Mobile County, 209 U. S. 405 33
50 Corpus Juris 74 49
Childs on Suretyship 49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 692.

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE APPELLANT.

STATEMENT.

Jurisdiction.

This is an appeal from the Supreme Court of Illinois, the highest court of that state. It is a consolidation of two cases (R. 11, 30) tried as one in the Municipal Court of Chicago, and so heard on appeal. The trial was before the court without a jury upon a stipulation of facts. (R. 12.)

The opinion of the Supreme Court is published as follows: *People ex rel.* v. *G. H. Cross Company, et al.*, 361 Ill.

405; 198 N. E. 356. It is also to be found, at pages 31 to 42 of the printed record.

A statement as to jurisdiction in accordance with Rule 12 of this court was duly filed, and an order entered postponing further consideration of that question to the hearing of the case on its merits. The appeal involves the sole question whether an act of the legislature of the State of Illinois, as interpreted and applied by the Supreme Court of that state, is violative of the commerce clause of the federal constitution. Hence the jurisdiction of this court is invoked by virtue of Section 237 of the Judicial Code as amended (28 U. S. C. A., Sec. 344), the Act of January 31, 1928 (Chap. 14, 45 Stat. 64; 28 U. S. C. A. sec. 861 (a)) abolishing writ of error, etc., and the Act of April 26, 1928 (Chap. 440; 45 Stat. 466; 28 U. S. C. A., sec. 861 (b)).

The constitutional questions were raised by the defendant upon its first appearance in court in its affidavits of meritorious defense filed in accordance with the practice of Illinois (Pars. 6, 7, 8 of the Affidavits, R. 5, 6, 24, 25). The same questions were raised in the amended affidavits of merits upon which the cause went to trial (Pars. 6, 7, 8, 9 and 10, R. 8, 9, 10, 26, 27, 28), and also, in effect under the practice of Illinois, at the conclusion of the trial by the defendant's motion for a finding in its favor, which was denied, and by the plaintiff's motion for a finding in his favor, which was allowed. (Record below, 75.)

The validity of a statute being involved the appeal was taken as directed by the Illinois constitution (Art. VI, Sec. 11) not to the intermediate Appellate Court, but directly to the Supreme Court of the state. In that connection the trial judge certified that there was involved the validity of the Illinois statute under the constitutions of the State of Illinois and the United States. (Record below, 76.)

The Constitutional Question.

The Illinois statute complained of undertakes (as we will later show in detail) to license and regulate in Illinois the business of commission merchants handling shipments of farm produce. Nothing is said in the act as to whether the shipments contemplated are intrastate only or interstate also. The statute merely uses the phrase "within the State" as to the business regulated.

Anyone without such a license issued by the state authorities is prohibited by the statute from engaging in that business. And everyone licensed and so engaged is required to conduct his business in accordance with the regulations of the statute and the state authorities acting under it. The license covers the period of a year. As an essential requisite to its issuance the applicant must furnish a bond for the same period conditioned upon an honest accounting and handling of the produce involved.

A federal statute similarly undertakes (as we will later show in detail) to license and regulate the business of commission merchants handling "perishable agricultural commodities, in interstate * * * commerce." Under that act anyone without such a license issued by the federal authorities is prohibited from engaging in that business. And everyone licensed and so engaged is required to conduct his business in accordance with the regulation of the statute and the federal authorities acting under it.

The G. H. Cross Company, hereinafter referred to as the Cross Company, was a corporation of the State of Illinois, located in Chicago, and engaged in the business of handling farm produce and perishable farm commodities on consignment and on commission. (Par. 1 of Stip. of Facts, R. 13.) It was engaged largely in interstate business, but also had some intrastate business. Ninety-five per

cent of the total shipments were solicited and originated without and were shipped into the State of Illinois, and less than five per cent originated in Illinois. (Par. 2 of Stip., R. 13, 14.)

All of the produce received and handled by the Cross Company was consigned to it, remained the property of the consignors until sold, and was sold in the original packages as received from the consignors. No consignments were purchased by the Cross Company for its own account and resold by it. (Pars. 1 and 2 of Stip., R. 13.)

The Illinois state authorities interpreted the Illinois statute, not merely to regulate or require the licensing of the commission merchant business carried on entirely within the State of Illinois, but to regulate and license the business of any commission merchant located in the state in soliciting, receiving and handling on consignment and commission farm produce to be shipped in, and actually shipped in, from outside the State of Illinois. And even if a commission merchant were engaged solely and exclusively in soliciting, receiving and handling on consignment and commission farm produce shipped in from outside the state, state authorities insisted the act was mandatory that such a person secure a bond and license under the state statute before engaging in that business, and that in carrying on the business he submit to the regulations stipulated by the statute. Otherwise he would be subject to prosecution. (Stip., pars. 4, 5, R. 14.)

Accordingly the Cross Company was compelled by the force of the Illinois statute to apply for and secure a license to cover its business both interstate and intrastate; and in connection with that application was compelled to secure and deliver a surety bond in the amount of $5,000.

The bond uses no language either to cover or exclude interstate shipments, other than the general language pur-

porting to cover shipments which the Cross Company was about to be licensed to handle under the Illinois Act. The condition of this bond was that the Cross Company would honestly account for and handle all the produce received, and make payment to the consignors of all moneys received for the goods consigned to the principal for sale, and indemnify the consignors from and against all fraudulent acts of the principal in the sale or handling of the goods of the consignors, and keep, perform and abide by all the terms, conditions and provisions of the Illinois Act, and all lawful rules and regulations of the Department of Agriculture of the State of Illinois made in pursuance of the act. (R. 4.)

The Hartford Accident & Indemnity Company (for brevity here referred to as the Hartford) for a consideration executed bonds for $5,000 each for two successive years. (R. 4, 22, Stip. of Facts, R. 14.)

The Cross Company was also obliged by the force of the federal statute to apply for and secure a federal license from the Secretary of Agriculture in order to pursue the business of handling shipments of farm produce originating from outside the State of Illinois. (Stip. of Facts, 13. R. 16.)

In October 1932, the Cross Company became bankrupt and failed to account for a great many shipments of farm produce sent into Chicago on consignment. (Stip. of Facts, 9, 10, R. 15.) The shipments were all of fresh fruits and vegetables (Stip. of Facts, par. 10, R. 15, 3, 20, 21), that is to say of a kind of commodity which is specifically covered by both the state and federal acts. Some of the shipments were from Illinois but most of them from other states.

Thereupon the state authorities, persisting in their construction that the Illinois statute applied to interstate as well as intrastate business, brought the two suits on the

two bonds in question in this case against the Hartford and the Cross Company to recover for such shipments not accounted for.

The suit on the first bond covering the period from the 1st of July, 1931, to the 1st of July, 1932 (R. 2, 4, 14), sought to recover on account of a single shipment consisting of a car load of apples shipped in from the State of Washington by a resident of that state on consignment to the Cross Company at Chicago. (R. 3, 15, 16.)

The suit on the second bond, covering a period from the 1st of July, 1932, to the 1st of July, 1933 (R. 14, 18), was brought to recover on a great number of shipments of fruit and vegetables from various persons in several parts of the country, but mostly out of the State of Illinois. Eleven of the shipments were from Illinois, and ninety-two from without. In dollars, about $380 represented Illinois shipments and about $13,500, shipments from without the state. (R. 20, 21.)

In both of these suits, so far as the controversy here is concerned, the Hartford, acting within its rights as will later be shown, challenged the Illinois statute as so construed, and the bond exacted under it; and maintained that the State Act was unconstitutional as violative of the commerce clause of the federal constitution in so far as it licensed and regulated or was construed to license and regulate interstate shipments of farm produce, and in so far as the bond purported to cover or was construed to cover such shipments. The contention being that Article 1, Section 8, clause 3 of the federal constitution, the commerce clause, was violated, in that the act as so construed was a restriction and burden upon and a regulation of interstate commerce (R. 6, 9, pars. 6; R. 25, 27, pars. 6, 8), and also in that Congress had prior to the application for the license and issuance of the bond enacted the legislation

above referred to and entitled "The Perishable Agricultural Commodities Act of 1930" (46 Stat. 531) covering consignment shipments of perishable commodities in interstate commerce, which was the same subject matter as that of the Illinois Act. (R. 7, par. 8; R. 10, par. 10; R. 25, par. 8; R. 28, par. 8.)

The trial court held the act valid as interpreted by the state authorities to apply to interstate shipments, and accordingly that the bonds were valid also, and covered the same shipments. A judgment was rendered for the full amount of the shipment in the first case (R. 12), and for the full penalty of the bond in the second. (R. 30.)

The federal and the Illinois statutes.

A full copy of the Illinois act, the validity of which is involved is attached hereto as Appendix "A", and also a full copy of the Federal Act (46 Stat. 531; 7 U. S. C. A. 499 (a) *et seq.*) is attached as Appendix "B".

It is to be noted that the Federal Act referred to in the opinion of Mr. Justice Wilson of the Supreme Court of Illinois is not the Federal Act which the appellant has pointed to in this connection. The act Mr. Justice Wilson points to (361 Ill. 405, 411, 412) (R. 35, 36) is Chap. 20, Title 7, Sec. 491, *et seq.* (which is 44 Stat. 1355) whereas the act pleaded in the Affidavits of Merits is 46 Stat. 531 (R. 7, 10, 25, 29, Stip. of Facts, par. 13, R. 16.) The U. S. C. A. reference to this act is Title 7, Chapter 20A, pars. 499 (a) *et seq.*

As the subjects dealt with by the two acts present a question of basic importance in this matter, we submit the following comparative summary of their various licensing and regulating provisions with reference to the business they purport to regulate and control.

The titles to the two acts:

The State Act is entitled "An Act to Regulate the Consignment and Sale on Commission of Farm Produce."

The Federal Act is entitled "An Act to Suppress Unfair and Fraudulent Practices in the Marketing of Perishable Agricultural Commodities in Interstate and Foreign Commerce."

With reference to the persons and business covered:

The State Act, paragraph 1, defines a commission merchant as one licensed under the act to receive, sell or offer for sale on commission "within this State" any kind of farm produce.

The Federal Act, Section 1, paragraph 5, defines a commission merchant as one engaged in the business of receiving in interstate commerce any perishable agricultural commodity for sale on commission. It stipulates in subparagraph 8, that a transaction in any perishable agricultural commodity shall be considered in interstate or foreign commerce if the commodity is a part of that current of commerce usual in the trade in that commodity, whereby such commodity and other products of such commodity are sent from one state, with the expectation that they will end their transit, after purchase, in another.

With reference to the produce dealt in by the business licensed and regulated:

The State Act, Section 1, paragraph 1 (b) defines farm produce to include practically everything of that general nature.

The Federal Act, subparagraph 4, defines perishable agricultural commodities as fresh fruits and fresh vegetables of every kind and character.

As to the license:

The State Act, Section 2, prohibits any one from entering into business as a commission merchant without a license. It provides:

> "No person, firm, exchange, association or corporation, shall receive, sell or offer for sale, or solicit, consignments or shipments for sale on commission *within this State* any kind of farm produce, without a license as provided in this Act." (Italics ours.)

It requires a person or corporation seeking a license to apply to the State Director of Agriculture and in his application to state the kinds of farm produce he proposes to handle, the name he proposes to use, and if a firm the name of the officers, and the name of the local agent, address, etc., and that

> "such applicant shall further satisfy the Director of his or its character, responsibility and good faith in seeking to carry on a commission business."

It is then provided that the Director of Agriculture shall issue the license upon the payment of ten dollars *and the execution and delivery of a bond* as later provided for. The license permits the applicant to conduct a commission business at the place named until the succeeding first of July. *Separate licenses and bonds are required for each location.* The license must be posted in the office of the commission merchant. The bond required by paragraph 3 is in the amount of $5,000 and conditioned on an honest accounting and handling of the produce received and against fraudulent acts.

The Federal Act, Section 3, prohibits any person at any time from carrying on the business of a commission merchant in interstate commerce without a license. The application for such a license is to be made to the Secretary of Agriculture under regulations provided by him as to the

information to be given, etc. Only a single license is required and its term is as long as the annual fees of $10 each year are paid or until canceled for cause.

As to the granting and revoking of a license:

The State Act provides, Section 5, that the Director may refuse to grant a license or revoke one already granted "where he is satisfied of the existence of the following cases, or any of them." Then follows a list of cases, including: false charging; failure to account promptly; false statements as to condition, quality and quantity of goods received; false or misleading statements as to market conditions; combinations to fix prices; where the commission merchant directly or indirectly purchases goods for his own account without authority; where the commission merchant is in bankruptcy, or the Director believes that bankruptcy may shortly occur; where a continued course of dealing is of such a nature as to satisfy the Director of the inability of the licensee to properly conduct the business of a commission merchant; where there is shown intent to deceive or defraud shippers; where there has been fraud or deception in obtaining the license; or where a new bond is not filed when the old one is held to be unsatisfactory.

The Federal Act, Section 4 (a), provides for the issuance of the license and 4 (b) for a refusal to issue or for a revocation of a license already issued, if the licensee himself, his partners or brother officers, have been guilty of a violation of Section 2 of the act making "unfair conduct" unlawful. "Unfair conduct," Section 2, is defined in connection with any transaction in interstate commerce as covering (1) fraudulent charging; (2) rejection without reasonable cause of perishable agricultural commodities; (3) discarding, dumping or destroying without reasonable

cause; (4) making for a fraudulent purpose false or misleading statements as to market conditions "for any perishable agricultural commodity which is received in interstate commerce", and a failure to account promptly; (5) fraudulent representations as to place of production of perishable agricultural commodities received in interstate or foreign commerce; (6) tampering with markings on containers as to the grade of the commodity, etc.

As to regulating the business:

The State Act, paragraph 7, requires commission merchants to keep records of produce, including name and address of consignor, dates of receipt, kind and quantity of produce, condition of the shipment, when received, the amount of goods sold, date of the sale, name and address of the person to whom sold and his license number, if possible, the price received, and the items of expense. Memorandum of this record, with exception of purchasers' names, etc., is to be sent, together with payment, to the shipper within 48 hours. The commission merchant is to retain the record for six months open to the inspection of the Director of Agriculture. The burden is placed on the commission merchant of proving the correctness of his records.

The Federal Act provides, Section 9, for the keeping of accounts and records disclosing all transactions covered by the act.

As to violations of the two statutes, complaints, hearings and punishment:

The State Act, paragraph 4, provides for investigation by the Director of Agriculture upon a verified complaint of a person interested, or on his own motion, with reference to commission transactions, including accounting, dealings with the shippers, and statements with reference there-

to. It gives the right to the Director to examine books and records of the commission merchant.

The State Act, paragraph 4, further provides that the consignor shall have the right to demand within sixty days an honest accounting. If he does not receive it within ten days thereafter he may file a complaint with the Director with full particulars. The Director then attempts to get an explanation, and failing one within seven days requires a hearing. At that hearing he has the right to revoke the license.

The State Act, paragraph 6, further provides that the action of the Director is subject to the review by the courts on writ of certiorari.

The Federal Act, Section 5, imposes a direct liability on the commission merchant to any person injured for any violation of the following paragraphs of Section 2: subparagraph 1, concerning fraudulent charging, and subparagraph 2, concerning unreasonable rejection of perishable commodities, and subparagraph 3, unreasonable discarding, dumping or destroying. and subparagraph 4, false and misleading statements as to market conditions, quality and quantity or disposition of the produce, and a failure or refusal to account correctly and promptly.

The Federal Act, Section 6, further provides for complaints by persons injured and investigation by the Secretary. In addition to the person injured *any officer of any State can file a complaint.* The Secretary investigates complaints filed, giving the person complained against an opportunity to be heard, and then determines whether there has been a violation.

The Federal Act, Section 7, further provides that if the Secretary after hearing determines there has been a violation he orders reparation, or the payment of damages, and if

the commission merchant does not comply within the time limited, the complaint can be followed up in the District Court of the United States, where the findings and orders of the Secretary shall be prima facie evidence of the facts stated. If the complainant succeeds he is entitled to attorney's fees.

The Federal Act, Section 8, further provides for publication of the Secretary's findings and the suspension of the license. And Section 10 stipulates that the findings are final unless proceedings are taken in court. In conducting these hearings the Secretary by virtue of Section 13 is given the power to examine the accounts and records of the commission merchant, and to suspend the license in the event of a refusal to permit an examination, to issue subpoenas, to compel the production of records and the attendance of witnesses and to order the taking of depositions. He is also given the power by Section 14 to employ inspectors to inspect and certify, even if there is no complaint, the quality and condition of any perishable commodity when offered for interstate shipment, all under such rules and regulations as he may prescribe.

As to penalties:

The State Act provides as a penalty for failure to comply with the terms of the act, paragraph 8, a fine of not less than $25, nor more than $500.

The Federal Act provides, Section 12, for the report of all violations to the Attorney General and prosecution by him.

The Federal Act, Section 11, makes applicable laws with reference to injunctions.

The Federal Act concludes, Section 15, that

"The Act shall not obscure or violate any other statute, whether State or Federal, dealing with the same

subjects as this Act, but it is intended that all such statutes shall remain in full force, except in so far as they are inconsistent therewith, or repugnant thereto."

In the stipulation of facts under which the consolidated cases was tried, it was agreed that the facts so stipulated, in so far as they related to the Cross Company, the construction of the statute by state authorities, and the exaction of the licenses and bonds under the statute in that company's case, applied equally as well to all other persons, firms or corporations in the City of Chicago who solicited, received and handled farm produce for sale on commission. (See par. 6 of Stip. R. 14.) In other words, the cases were tried to test the question whether the act in question was constitutional.

THE ERRORS RELIED ON FOR REVERSAL.

The error here relied on for reversal is that the Municipal Court of Chicago, and the Supreme Court of Illinois on appeal, erred in holding that:

The Illinois statute as construed to cover shipments in interstate commerce was not violative of the commerce clause of the federal constitution. (Art. I, Section 8, Clause 3);

That the bonds exacted under the statute so construed were valid so far as such interstate shipments were concerned, and covered such shipments;

And that the plaintiff was entitled to judgments on said bonds for the sums unaccounted for in connection with such interstate shipments.

SUMMARY OF ARGUMENT.

The Illinois statute is violative of the commerce clause of the federal statute in that it imposes a direct and substantial burden on interstate commerce.

The statute is not a mere tax on the property involved after it has become a part of the general mass of property within the state. It does not merely impose on men engaged in the business of commission merchants a tax measured by that business as a whole. But it undertakes to directly license and regulate the business itself, and to prohibit any one engaging in the business without such a license.

Without question both the shipment and sale of goods brought into Illinois from outside constitute interstate commerce.

The business of a commission merchant in handling such sales, particularly of "perishable agricultural commodities," is an integral part of the interstate commerce transaction:

First. Because in and of itself the functions it performs in connection with the sales are not indirect but are direct and constitute essential elements and factors in the completion of the interstate transaction;

Second. Because Congress has recognized the essentially important and vital part the business plays in the sale of such interstate shipments of perishable farm produce, and has by appropriate legislation provided for licensing and regulating that business, and prohibited those without a license from engaging in it.

These considerations render entirely inapt certain cases of this court, relied upon by the Supreme Court of Illinois in its opinion, and holding that the business of certain

commission merchants only remotely and indirectly affects interstate commerce transactions, and that hence the statute controlling that business is only a remote and indirect burden on commerce, and not invalid.

For the sole and only purpose of the owner in shipping his produce into Illinois is to effect a sale in the general produce market which exists for perishable farm produce, and protecting the goods meanwhile. And that purpose is solely carried out by commission merchants. They are the sole actors in that part of the transaction. If they fail to function the entire transaction is ineffectual.

And the finding of Congress that the business of the commission merchant dealing in "perishable agricultural commodities" not indirectly but directly affects interstate commerce, and the federal legislation controlling and licensing that commerce, conclusively demonstrate that the state act not incidentally but directly burdens the interstate commerce transaction.

Moreover, the federal legislation pre-empts the field with reference to this particular business.

The provisions of the federal act are entirely inconsistent with and repugnant to the provisions of the state statute. The absence of any provision in the federal act requiring as to interstate shipments a bond such as is required by the state act, is in itself a contradiction. Moreover, that absence represents not merely inaction but an affirmative conclusion by Congress to discard the theory embodied in the bond and exclude any such provision.

The inconsistency is further aggravated by the power given in the federal act to the Secretary of Agriculture to make rules and regulations with reference to the business.

Hence the Illinois statute being unconstitutional and invalid in so far as interstate commerce shipments are con-

cerned, the bonds exacted under that statute are invalid in so far as those shipments are concerned, and cannot be held to cover them.

By the execution and delivery of the bonds neither the Cross Company nor the Hartford waived the right to raise the question whether or not the act and the bonds exacted under it were valid as so construed.

ARGUMENT.

I.

THE SHIPMENT OF FARM PRODUCE FROM OUTSIDE THE STATE OF ILLINOIS ON CONSIGNMENT TO THE CROSS COMPANY IN ILLINOIS, AS WELL AS THE SALES OF THOSE GOODS ON BEHALF OF THE OWNER, WERE ALL TRANSACTIONS CONSTITUTING INTERSTATE COMMERCE. AND THE PART PLAYED BY THE COMMISSION MERCHANT IN THAT TRANSACTION IS SO IMPORTANT AND VITAL IN AND OF ITSELF THAT THE ATTEMPT TO REGULATE IT BY THIS STATE STATUTE IMPOSES A DIRECT AND SUBSTANTIAL BURDEN ON INTERSTATE COMMERCE, AND IS THEREFORE VOID.

The authorities of this court have definitely and finally settled the proposition that shipments from one state to another, as well as the sales following those shipments constitute interstate commerce.

It is also an established doctrine that a state statute under whatever guise, whether it be taxing, licensing or regulating, which imposes a direct and real burden on such interstate commerce is void.

In making that statement we readily concede the importance of the qualification that the burden must be a direct and real burden as *contra* distinguished to an indirect or negligible one.

Mr. Justice Wilson in rendering the opinion of the Supreme Court of Illinois relies especially upon the case of *Hopkins* v. *United States*, 171 U. S. 578.

In the case cited the Government was attempting to dissolve the Kansas City Live Stock Exchange, a voluntary association, on the charge that it was a combination in violation of the federal anti-trust law. The association was

engaged at the Kansas City Stockyards in the business of buying and selling live stock which had been sent in on consignment from other states. This court held that, conceding the fact that the sales themselves constituted interstate commerce, it did not follow that all persons performing services in that connection were engaged in interstate commerce; nor did it follow that the agreements made by such individuals amongst themselves as to compensation, etc. were made in restraint of interstate trade.

This it was further pointed out necessarily followed from the principle laid down in many prior cases drawing a distinction between regulations directly affecting and embarrassing interstate commerce, those which affected it only indirectly or slightly or constituted nothing more than a local facility provided for the transaction of such commerce.

The court concluded that the commission merchants constituting the Kansas City Live Stock Exchange were not engaged in a function which directly affected interstate commerce, and that therefore they were not subject to the anti-trust law.

We submit that this case has not the compelling effect given it by the opinion of the Supreme Court of Illinois, since it is simply as pointed out by this court in many later cases, a decision with reference to the particular facts there involved. And it cannot control, therefore, with reference to functions similar, it may be true, but sufficiently different in their importance to make up the difference between a direct and an indirect effect on interstate commerce.

Furthermore, the decision cannot be considered in point at all, in view of the all important fact that Congress itself has determined that the commissionman is an essential element in interstate commerce shipments and sales of perishable farm products.

In connection with the Hopkins case we desire to point out particularly the three following cases:

Stafford v. *Wallace,* 258 U. S. 495 (May, 1922).

This case also involved the members of a live stock exchange, including the commission merchants buying and selling live stock in the stockyards throughout the country. These parties filed equity proceedings to enjoin the enforcement of the Federal Packers and Stockyards Act, claiming that under the Hopkins case they as commission merchants were not engaged in interstate commerce. This court points out the evils sought by Congress to be corrected, and that in view of the conspiracy charged in connection with the entire business the commission merchants were in fact a part of the interstate commerce engaged in that entire business.

And in distinguishing the Hopkins case, this court says on page 525:

> "Again, if the result of the combination of commission men in the Hopkins case had been to impose exorbitant charges on the passage of live stock through the stockyards from one State to another, the case would have been different, as the court suggests. The effect on interstate commerce in such a case would have been direct."

In the case of *Bedford Company* v. *Stone Cutters Association,* 274 U. S. 37, a labor union case, this court with reference to the Hopkins and Anderson cases, 171 U. S. 578 and 604, says, at page 49:

> "But of those cases we need say no more than that they involved agreements which neither in purpose nor in necessary result related to or had any direct effect upon interstate commerce."

The case of *Stockard* v. *Morgan,* 185 U. S. 27, makes no reference to the Hopkins case, but the court spoke through Mr. Justice Peckham who also wrote the opinion in the Hopkins case. The Morgan case was a suit to enjoin the

collection of a tax on a merchandise broker under statute of Tennessee. The complainants were residents of Tennessee, taking orders for goods in Tennessee, which orders were to be filled outside of the state. Complainants were paid a commission. They contended that they were doing an interstate commerce business and that the law as applied to them was unconstitutional. This court so holding, says (p. 35):

> "In this case the complainants did not represent or assume to represent any residents of the State of Tennessee, and each of the complainants represented only certain specific parties, firms or corporations, all of whom were nonresidents of Tennessee. They did no business for a general public. We attach no importance to the fact that in the *Robbins* case the individual taxed resided outside of the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the question."

In the recent case of *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, the question presented to this court was whether or not a statute of the State of New York was violative of the commerce clause in that it attempted to license milk dealers and prohibit any one without a license from selling milk in the state, and forbade such a license to any one refusing to sign an agreement to conform to the New York statute and regulations in the sale of milk imported from other states. This an applicant refused to do, because he was able to buy milk in Vermont at prices lower than the minimum payable to producers in New York. He sought to enjoin the prosecution of the enforcement of the law. An injunction was granted in so far as the statute attempted to license the sales of milk brought in and sold in the original containers. It was denied as far as the licensing of sales of milk that was removed from the original containers to bottles and then sold.

This court holds that the injunction was properly granted as to the original package sales, and should have been granted as to the others, as it was all a part and parcel of interstate commerce.

With reference to the question whether the burden thus placed on the transaction was direct or indirect, this court says, at page 522:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the State taking form in customs barriers and other economic retaliation.' "

Texas Transportation Co. v. *New Orleans,* 264 U. S. 150. Here there was involved a license tax imposed by the City of New Orleans upon the business of a steamship agent. The agent resisted the tax on the ground that it was a violation of the Commerce Clause of the Constitution. He was employed by four steamship lines on a commission based upon the gross freight charges collected on shipments successfully solicited by him. All of the four companies were exclusively engaged in interstate commerce. This court said, *page 152:*

> "* * * We find it unnecessary to do more than refer to the general and well established rule, which is that a State or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the State prior to their introduction therein, *Stockard* v. *Morgan,* 185 U. S. 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. * * *"

A similar case to this is the one following.

Di Santo v. *Pennsylvania*, 273 U. S. 34.

In this case it appears that the Pennsylvania law required that a license be taken out by any one selling steamship tickets for transportation to foreign countries. Di Santo was indicted because he had not obeyed the law. He contended that it contravened the commerce clause of the federal constitution. The court sustained his contention, saying, at page 36:

> "The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. * * * Such legislation cannot be sustained as an exertion of the police power of the state to prevent possible fraud. *Real Silk Mills* v. *Portland*, 268 U. S. 325, 336. * * * The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce."

Real Silk Hosiery Mills v. *Portland*, 268 U. S. 325.

Real Silk Hosiery Co. sold their product through drummers soliciting and accepting orders. The solicitor would take a dollar deposit, forward the company the order, and the company would send the order parcel post c. o. d. The deposited dollar was retained by the solicitor as his commission. The company undertook to pay back the dollar if the purchaser was dissatisfied.

The corporation was an Illinois corporation, with factory at Indianapolis. The City of Portland, Oregon, passed an ordinance requiring every person soliciting orders from place to place to pay a license fee and to furnish a bond conditioned to make final delivery of the ordered goods. A

bill was filed to restrain the enforcement of the act as being repugnant to the commerce clause. This court said (p. 335):

> "'The negotiations of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.' Manifestly no license fee could have been required of appellant's solicitors if they had traveled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189."

In the Texas Transportation Company and Real Silk Hosiery cases just cited, the fact is stressed that the negotiations for the sales took place prior to the introduction of the goods within the state. But it really makes no difference when the negotiations took place as is pointed out in the following cases.

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282.

A Tennessee corporation bought wheat in Kentucky, the wheat to be delivered and paid for there f. o. b. Purchaser was to ship the wheat to Tennessee. Suit was brought in Kentucky to recover the purchase price. The defense was that the plaintiff had not complied with the Kentucky statute, prescribing conditions upon which corporation of other states might do business in the state.

The court said (p. 290):

> "Where the goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages."

(On page 291):

> "In no case has the court made any distinction between buying and selling or between buying for transportation to another State and tranporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

See also to the same effect:

Furst v. *Brewster*, 282 U. S. 493.

Note also in this connection the decision of this court in the case of *Baldwin* v. *Seelig*, above cited, 294 U. S. 511, where the same situation existed with reference to negotiations for the sale as exists in the case at bar.

Crutcher v. *Kentucky*, 141 U. S. 47, involved an indictment against Crutcher for doing business as an agent for the United States Express Company, without a license under a state statute. Crutcher contended that the act in question was repugnant to the power given to Congress to regulate commerce.

This court in holding the statute void said (p. 58):

> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." (Citing cases.)

Federal Trade Commission v. *Pacific Paper Assn.*, 273 U. S. 52.

This was a Federal Trade Commission case under the anti-trust laws. An attack was made on a certain trade association of paper manufacturers as a combination in restraint of trade. The question was whether the activities constituted interstate commerce. It was shown that the sale by the wholesaler to the retailer in the same state in-

cluded as a part of the contract a delivery of the paper sold from a mill in another state to the retailer.

In holding that this constituted interstate commerce, this court said (page 64) that interstate commerce

> "is not confined to transportation but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55."

Corson v. *Maryland*, 120 U. S. 502:

> "Maryland statute provides that "no person * * * other than grower, maker or manufacturer shall barter or sell * * * goods * * * within this State without first obtaining a license."

A New Yorker was indicted because he had come into the state and sold goods as a commission merchant without a license. The Supreme Court holds that the same principle applied as was applied in an earlier decision of the same term, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489. In that case a Tennessee statute required that all drummers not having an actual licensed house of business in Shelby to take out a license. An Ohio resident who was selling in Shelby without a license was indicted. It was held that as far as he was concerned the act was repugnant to the federal constitution.

Lemke v. *Farmers Grain Co.*, 258 U. S. 50.

Suit by Farmers co-operative association to enjoin the enforcing of the North Dakota Grain Grading & Inspection Act.

It was shown that there was no market for the grain in North Dakota, and that all grain was taken to the grain elevators and from there shipped to other states. The associa-

tion was co-operative and the grain was simply held in the elevators pending the sale. The association would watch the market prices of grain and decide to sell and ship it to Minneapolis, Duluth, etc. consigned to commission merchants.

The court said, page 54:

> "That such course of dealing constitutes interstate commerce there can be no question."

The court then takes up the question whether the act is a burden on interstate commerce and holds that it is in view of the many regulations as to licensing, grading, etc.

Brown v. *Maryland,* 12 Wheaton, 419, 25 U. S. 554.

A Maryland act imposed a tax upon all importers of foreign goods. A man engaged in that business was indicted. His defense was that the act was unconstitutional for the reason, amongst others, that it violated the commerce clause. And the court, speaking through Chief Justice Marshall, in sustaining that position says at page 565:

> "Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.'

Mr. Justice Wilson in his opinion in the Supreme Court of Illinois cites the case of *Minnesota* v. *Blasius,* 290 U. S. 1. But in that case the question was of a tax on the property which had come to rest in the state. It does not gainsay the principle above cited that the sales of goods transported into the state as well as the transportation constitutes interstate commerce.

We submit that the tax on the property which has become a part of the general mass of the property within the state, as was found to be the fact in the Blasius case, is basicly different from a license on the business of bringing that property within the state and selling it. That distinction lies in the principle pointed out by this court as follows, on page 9 of the opinion:

> "Thus, the State cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. But by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a nondiscriminatory property tax."

Also in the opinion of Mr. Justice Wilson there is cited and relied on the N. R. A. decision, *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495. But in this citation the essential fact is overlooked that the action regulated by the federal statute was the handling of the goods which were shipped in from other states *after* those goods had been sold by the *commission men* in the markets to residents in New York State for slaughter and resale. The regulations related to the hours and wages of those employed in the slaughter houses in connection with this part of the transaction. And this court particularly holds, on page 542, that:

> "When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended."

This very fact marks the distinction between the Schechter case and the case of *Local 167, International Brother-*

hood of Teamsters v. *United States*, 291 U. S. 293. The case at bar, we submit, is directly within this last mentioned case.

Local 167, International Brotherhood of Teamsters, etc. v. *United States*, 291 U. S. 293.

This was a decree from an injunction against a conspiracy claimed to have been committed by the above referred to union, together with the New York Live Poultry Chamber of Commerce and the conspiracy concerned prices, etc. The Chamber of Commerce was an association of market men. The question before the court was whether or not the parties involved were engaged in interstate commerce in connection with their dealings with live poultry. This court, describing the decisions, says at page 295:

> "Live poultry for sale and consumption in the New York metropolitan area continuously moves in great volume from points in distant States to commission men, called receivers, at railroad terminals in Manhattan and Jersey City. The receivers sell to market men. The larger part of the poultry is delivered directly from the cars; the remainder from stands maintained by the receivers."

With reference to whether or not interstate commerce was involved in this business the court says, at page 297:

> "The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

We submit, therefore, that these cases decided mostly since the decision in the case of *Hopkins* v. *United States*, 171 U. S. 578, clearly show, as to sales made in interstate commerce, the demarcation between the functions described in the Hopkins case and those, which because of their importance, are not merely collateral matters, but are an integral part of the interstate commerce transaction.

All of those cases must be considered in connection with the business which the state undertook to regulate and license, namely, the business of handling perishable farm produce. The very nature of that business requires prompt and immediate handling. And any regulations must of necessity have the effect of hampering the expedition demanded.

The produce sent in from outside the state on consignment to the commission merchants regularly in business within the state, is sent by the producer for one purpose only, to sell it. And it is the immediate job of the commission merchant to effect that sale. If he fails to function in making the sale the entire transaction becomes an *idle gesture. If he fails in his duties in preserving a* perishable commodity, the owner has not only lost his sale but has lost his goods.

The importance of his functions, therefore, cannot be measured. Certainly to attempt to separate them from the shipment and the sale itself is a practical impossibility. The function starts with soliciting the shipment, with the action of the shipper in selecting the particular commission merchant, and ends when the sale has been consummated. If the commission merchant's part were separated in this transaction, practically speaking, nothing would be left.

II.

THE ACTION OF CONGRESS IN REGULATING AND LICENSING THE BUSINESS OF COMMISSION MERCHANTS ENGAGED IN INTERSTATE SHIPMENTS IS A CONCLUSIVE SHOWING THAT THE FUNCTIONS PERFORMED BY A COMMISSION MERCHANT IS AN ESSENTIAL PART OF THE INTERSTATE COMMERCE TRANSACTION. HENCE THE STATE ACT UNDERTAKING TO LICENSE THOSE FUNCTIONS IS A DIRECT BURDEN ON THE INTERSTATE COMMERCE TRANSACTION, AND IS VOID.

We think it well to note again that the Federal statute referred to in the opinion of the Supreme Court of Illinois is not the one upon which the appellant relies here and has relied from the first; all as more fully explained at page 7 above.

At page 7 above, the State Act and the Federal Act upon which we rely are summarized. The complete copies of the Acts are attached to this brief as Appendix "A" and "B" respectively.

Even if it were admitted that the business of a commission merchant is not in and of itself a direct substantial part of the interstate commerce involved in the shipment and sale of foreign goods, it is clear that that contention can no longer be made after Congress has found that the business of a commission merchant is a substantial part of the interstate commerce involved, and undertakes to regulate it.

When such a situation exists it is a demonstration that the business and activities sought to be licensed and regulated by the State is interstate business. And it demonstrates also that the state statute affects the business not incidentally but directly and imposes a substantial burden upon it. It is this consideration which has differen-

tiated between the case of *Hopkins* v. *U. S.*, 171 U. S. 578, and many subsequent cases.

Stafford v. *Wallace*, 258 U. S. 495.

This case involves the constitutionality of Packers and Stockyards Act of 1921. There were several actions, some of which involved commission merchants conducting sales of cattle shipped into the stockyards from other states. It was contended that the transactions were not interstate commerce, and therefore not within the federal power. The opinion was by Judge Taft in 1921. He said, page 515:

> "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the live stock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."

The two following cases also demonstrate very clearly the principle that where Congress has found an activity that is

connected with interstate commerce to need regulation, that very fact shows it must be regarded as a substantial part of interstate commerce; and any attempt to regulate it by state statute is unconstitutional.

Ware and Leland v. *Mobile County*, 209 U. S. 405 (1908).

Here an Alabama statute imposed a license tax on persons engaged in buying and selling futures on commission. The defendant had an office in Alabama, also in New York, New Orleans and Chicago. He would undertake to buy cotton futures on the Cotton Exchange in New York, New Orleans, etc., with nothing said as to actual delivery of the cotton. No actual delivery was ever made, although the rules of the New York, New Orleans and Chicago Exchanges required a delivery.

The court, following the *Paul* v. *Virginia Insurance* case (8 Wall. 168) said there was no interstate commerce involved and sustained the state statute.

But in the later case of *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, where there was involved a federal act which had been drafted for the very purpose of licensing and controlling interstate sales and purchases of grain, and in that connection of eliminating certain evil features in connection with grain futures, the court held that the business of dealing in grain futures was interstate commerce subject to a federal act.

In that case it appeared that the Board of Trade of Chicago had filed a bill for injunction to enjoin the enforcement of the provisions of the National Grain Futures Act.

This court speaking through Mr. Justice Taft held that the act was framed to prevent trade in grain futures because Congress had found that such trade constituted a recurring burden and obstruction to commerce. The court pointed out that the Board of Trade is the greatest grain

market in the world and that the *Swift* case (196 U. S. 375) was a milestone and recognized the great changes and developments of business in the country, and concluded that the finding of Congress that the business as engaged in by the Board of Trade was interstate commerce was not unreasonable.

Shafer v. *Farmers Grain Co.*, 268 U. S. 189, involved a statute of the State of North Dakota requiring any person wishing to engage in the business of buying, weighing and grading wheat to apply for and secure a license from the state authorities. There was a bill to enjoin enforcement of the act. This court in holding that the act was unconstitutional as constituting a substantial burden on interstate commerce, comments particularly on the requirements of the act as to the license and as to its cancellation should the licensee not honestly and correctly handle his business or violate any of the provisions of the United States Grain Standards Act. The act also required that grain elevators in paying cash in advance should file sufficient bond to secure payment for wheat bought on credit. The court noted the two rules with reference to such statutes, first, that if it interferes only incidentally and remotely with interstate commerce it is not prohibited and, second, that if its necessary operation directly interferes with and is a burden to such commerce it is prohibited. It then said, at *page 199:*

> "In our opinion the North Dakota Act falls certainly within the second of the two rules just stated. By it that state attempts to exercise a large measure of control over all wheat buying within her limits. About 90 per cent. of the buying is in interstate commerce.
>
> * * *
>
> "Only by disregarding the nature of this business and neglecting important features of the Act can it be said to affect interstate commerce only incidentally and remotely. That it is designed to reach and cover buying for interstate shipment is not only plain but conceded. To conform to recognized commercial practices

such buying must be by grade, and it is so conducted. The Act prevents buying by grade, unless the buyer secures from the State a grading license for himself or his agent. The general practice is to buy and ship without separating the dockage from the wheat, the price paid carrying a right to both. The Act requires the buyer to separate the dockage and return it to the producer, unless it be distinctly valued and paid for. A failure to comply with this or any other requirement of the act is made cause for revoking the grading license. It is practically essential that the buyers have and operate elevators as facilities for handling and loading the wheat. The act requires every such buyer to give to the state, if he buys on credit, a bond securing payment for all wheat so purchased; to keep a record of all wheat bought, showing the grade given and price paid at his elevator and the grade fixed and price received at the terminal market; and to furnish such data to the State Supervisor when requested. The Act also intends and declares that the State Supervisor 'shall in a general way investigate and supervise the marketing' of the grain with a view of 'preventing' various things deemed unjust or fraudulent, including 'unreasonable margins of profit' and 'confiscation of valuable dockage;' and, to the end that this and other provisions may be made effective, the Act invests him with authority to make and enforce such orders, rules and regulations as may be necessary to carry out all of its provisions.

"We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no State can do consistently with the commerce clause."

We quote this fully from the decision to show the important part that the character of the supervision bears to the court's opinion. With reference to the contention of the State authorities that the evils sought to be corrected were very real, the court answers, on page 202, that that would be a matter for Congress and not the State.

From the above quotation it is to be noted that there was also in force at the time the United States Grain Standards Act. It was contended that the State act was simply an attempt to assist in carrying out the purposes of that act. In connection with this contention the court says, at *page 202:*

> "We think the Act discloses an attempt to do much more. To require that dockage be separated by the buyer and be returned to the producer unless it be distinctly valued and paid for is not inspection. Nor does the federal Act contain or give support to such a requirement. To exclude one from buying by grade unless he secures a grading license for himself or his agent is apart from what usually is comprehended in inspection. Nothing like this is found in the federal Act. On the contrary, it declares that persons licensed to grade under it shall not be interested in any grain elevator or in buying or selling grain, or be in the employ of any owner or operator of a grain elevator. Equally unrelated to inspection are the provisions exacting a bond to pay for all wheat bought on credit; requiring that a record be kept of the price paid in buying at the local elevator and the price received in selling at the terminal market; and authorizing the State Supervisor to investigate and supervise the marketing with a view to preventing unreasonable margins of profit. None of these finds any example in the federal Act; and their presence in the state Act makes it a very different measure from what it would be without them. Aside from the adoption of the grades established and promulgated under the federal Act, we find little in the state Act to support and much to refute the assertion that it is merely an attempt to carry out the purposes of the federal Act."

III.

CONGRESS HAVING UNDERTAKEN TO LICENSE AND REGULATE THE BUSINESS OF COMMISSION MERCHANTS HANDLING PERISHABLE AGRICULTURAL COMMODITIES IN INTERSTATE COMMERCE, ANY STATE STATUTE ATTEMPTING TO DO THE SAME IS UNCONSTITUTIONAL AND VOID UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

Oregon-Washington Co. v. *Washington*, 270 U. S. 87.

In this case it appears that a very bad insect pest became prevalent through certain states of the west, chiefly confining itself to alfalfa. The state of Washington undertook to place a quarantine upon introduction of alfalfa across its border lines from other states. On the question of constitutionality the Supreme Court held that the act was within the power of the legislature of Wash' gton unless the national congress had elected to cover the same field. The court then studied an Act of Congress providing for the handling of just such pests and quarantining the sections where the pest was prevalent; and in holding that the federal act was exclusive and the state act therefore void, says, at page 99:

> "It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal Government the care of the horticulture and agriculture of the States, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine against importation into the country and quarantine as between the States under the direction and supervision of the Secretary of Agriculture."

It was said by Justice Holmes in the case of

Pennsylvania Railroad v. *Public Service Commission*, 250 U. S. 566, at page 569:

> "But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them."

In that case the State of Pennsylvania had passed a law providing that the rear car on any train should have a platform thirty inches wide. The railroad defended on the ground that it could not comply, as the Post Office Department had specified just the kind of mail cars which should be constructed and in the specifications stipulated there should be no platforms. The court held that the state statute was unconstitutional, using the language above referred to.

The same principle was laid down in

Sanitary District v. *United States*, 266 U. S. 405, 426.

> "In matters where the States may act, the action of Congress overrides what they have done. *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. *Second Employers' Liability cases*, 223 U. S. 1, 53."

Where regulations of the State statute regulating commerce cover the same field as provisions in a Federal statute, the State statute must of necessity fall. And it is submitted that a reading of the provisions of the Federal and State statutes above summarized respectively demonstrate that they do cover the same field.

Southern Railway Co. v. *Railroad Commission of Indiana*, 236 U. S. 439. An Indiana act required railway companies to place handholds on the sides or ends of every railroad car. A Federal act required cars to be equipped

with handholds. The defendant railroad was accused of not having complied with the State law. It was admitted that the car was engaged in interstate commerce. The defendant contended that the State statute was void. The State contended that the statute was not void as it had been settled by this court that the same action might constitute a criminal offense both as to Federal and State sovereignties. In answer to this contention this court held that an analysis of the principle showed that it related only to cases where the act sought to be punished is the one over which both sovereignties had simultaneous jurisdiction, and did not apply where a sovereign had exclusive jurisdiction when exercised; (445) and that such was the case with reference to interstate commerce where Congress had (page 446)

> "legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employes. Until Congress entered that field the States could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and *ipso facto,* supersedes existing state legislation on the same subject. Congress of course could have 'circumscribed its regulations' so as to occupy a limited field. *Savage* v. *Jones,* 225 U. S. 501, 533. *Atlantic Line* v. *Georgia,* 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties."

The court concludes, at *page 448:*

> "The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control. The Safety Appliance Act having superseded the Indiana statute the judgment imposing the penalty must be reversed, and the case remanded for further proceedings not inconsistent with this opinion."

Napier v. *Atlantic Coast Line*, 272 U. S. 605. This case involved a question of whether certain State statutes, calling for the installation of certain safety and comfort appliances on locomotives used in interstate commerce, were violative of the Commerce Clause of the Constitution, in view of the Federal Locomotive Boiler Inspection Act which gave to the Interstate Commerce Commission the power, not only to inspect locomotives, but to specify the sort of equipment to be used upon them. The court with reference to this question states that the devices prescribed by the states were primarily to promote health and comfort and then said, at *page 610:*

> "* * * It may be assumed, also, that there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only. * * *"

The court goes on to hold that the power delegated to the Commission was a general one and extended to every phase of the locomotive and concludes, at *page 613:*

> "* * * We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose."

We submit that the federal statute involved in the case at bar, and the regulations of the Secretary of the Agriculture promulgated within the general provisions of the statute, constitute a broad general power of license and control to be exerted by the federal authorities over the business in question when covering interstate commerce shipments. This is exactly the same field that is covered by the State act.

The State act prohibits anyone from engaging in the specified business without a license. If that act is to be construed to cover interstate business, then anyone even though he already has a license from the Secretary of Agriculture under the Federal statute would not be permitted to enter into the commission business with reference to interstate shipments. This in itself is such a serious conflict as to bring the statute within the decisions cited. The State statute requires a license for each location in which the commission merchant conducts his business. (Sec. 2.) The Federal statutes requires but one license wherever the business is done. (Sec. 3.)

If we add the other regulatory powers, the situation if possible is aggravated.

Consider for instance the complaints that can be made by nonresident shippers who feel they have been injured. Is it possible that they must present their complaints to both State and Federal authorities? Consider also the fact that both the State and Federal statutes give specific remedies in the event of a failure of the commission man to account. Must the shipper go to both? Or if he goes to one the other may bring the matter up of its own accord. Whose judgment is to be regarded as final? Consider also the anomaly of a State authority under the State act finding that a given action on behalf of the commission merchant was fraudulent, requiring a revocation

of his license to do interstate commerce business, and a consideration of the same question by the Federal authorities and an equally final conclusion that the action was not fraud, the license should not be revoked and that the merchant could continue in business.

Moreover, the provision of the federal statute (Sec. 6 (a)) giving to a State authority having jurisdiction over commission merchants in such State, the right to file a complaint before the Federal authorities, seems clearly to indicate the intention of Congress to give the exclusive jurisdiction with reference to interstate shipments to the Federal authorities.

We submit that these considerations show that the State statute as construed by the Supreme Court of Illinois to apply to interstate shipments and the Federal statutes are mutually exclusive.

Mr. Justice Wilson in the Supreme Court of Illinois decision cites the following cases which we respectfully submit are obviously distinguishable from the case at bar:

In the case of *Mintz* v. *Baldwin*, 289 U. S. 346, the question was as to the conflict between a New York statute forbidding the importation of cattle suffering from Bang's disease and Federal statutes undertaking to regulate the handling of cattle in interstate commerce. This court, holding that there was no conflict, points out that the New York statute expressly prohibited the importation of cattle suffering from the disease in question, whereas in the two Federal statutes the only provisions included were first those in the Federal Cattle Contagious Disease Act applying merely to shipments from quarantine districts; and, second, another act which simply gave the Secretary of Agriculture the power to prevent the spread of disease by appropriate regulations. It was shown that no such regulations had been issued so that importation of the cattle in question was not covered at all.

Another case cited is that of *Hall* v. *Geiger-Jones,* 242 U. S. 539, where there was no Federal Act involved, but the question was whether the provisions of the Ohio Blue Sky Law with reference to the sale of securities in Ohio contravened the Commerce Clause of the Constitution so far as it attempted to license and control dealings between Ohio brokers and others outside the State. The court comments upon the fact of the intangibility of the securities and passing by the question of whether they constituted interstate commerce holds that although there may have been some burden by the act it was indirect and the act was "valid in the absence of the assertion of the national power" (557).

Another case cited is that of *Savage* v. *Jones,* 225 U. S. 501, where there was in question an Indiana statute with reference to branding of certain food stuffs for domestic animals and requiring that before certain products of that nature be sold the manufacturer should file with the State Chemist a certificate of registration giving detailed information concerning the article. The question was whether this statute was in conflict with the Federal Food and Drugs Act. This court held it was not as that act simply was aimed at preventing adulteration and misbranding and with the exception of a few instances like morphine, opium, etc., contained no prohibition against transportation. Under these circumstances the court held that in the absence of more specific prohibition by Congress the State of Indiana still had the right to prohibit the introduction within its borders of substances that it determined were deleterious to the health of animals.

The case of *Sligh* v. *Kirkwood,* 237 U. S. 52, is also cited. In that case there was a Florida statute involved which prohibited the sale within its borders of citrous fruits which were immature or unfit for consumption. The court

held this statute valid, even as to shipments from outside the State, particularly in view of the fact pointed out on page 62 of the opinion that "no act of Congress has been called to our attention undertaking to regulate shipments of this character which would be contravened by the act in question," and that the Federal Food and Drugs Act did not cover the situation, as it prohibited only filthy, decomposed or putrid fruits and made no reference to immature fruits.

These cases, we submit, are clearly different from the case at bar.

Section 15 of the Federal act purporting to arrange for cooperation between the Federal authorities and the State authorities does not help the situation. Its provision that it shall not abrogate or nullify any State statute dealing with the same subject as this act cannot be held to apply to interstate commerce. Its purpose obviously is to eliminate any possibility of the contention that, having regulated the commission business as to shipments in interstate commerce, such regulation must of necessity affect the intrastate business and that, therefore, not only statutes relating to interstate business but those relating to intrastate business would be void. In other words, the section purports to obviate the contention applied with reference to interstate railroad rates and other like instances. This is particularly true in view of the very next sentence in the statute:

> "But it is intended that all such statutes shall remain in full force and effect *except in so far only as they are inconsistent herewith or repugnant hereto.*"

We submit for the reasons above pointed out and from a reading of the provisions of the two statutes that they are obviously inconsistent and repugnant as far as shipments in interstate commerce are concerned.

Certainly the provisions with reference to licensing are mutually exclusive. Complications of a double license being required with reference to the commission business would be endless and confusing. Complications and conflicts in double hearings and double penalties would be endless.

The State Act provides for a bond, the Federal Act does not. But the history of the Federal Act as disclosed by the proceedings in Congress shows that the provision was considered and discarded. The Act was first presented to Congress by Senator Borah in the 70th Congress, first session, as Senate Bill 1294. It was referred to the Committee on Agriculture. At that time it contained a section requiring a bond conditioned on full accounting. The Committee amended the bill materially, and in its report (Senate Report 825) included a copy of a letter from the Secretary of Agriculture as follows:

> "The bill as now drawn requires every person subject thereto to give a bond. Although the Department appreciates that good reasons for this requirement may be advanced, it is not believed that the losses that would be avoided through the giving of bonds would justify the expense that would be incurred in requiring their execution."

And the Committee adds that the letter points out the power of revoking licenses is considered sufficient. The provision concerning the bond was eliminated.

The bill in that form passed the Senate, but was not considered by the House. It was reintroduced by Senator Borah in the 71st Congress, and there passed both Houses. Speaking of this bill Senator Borah notes:

> "The original bill was much more drastic and placed the commission merchants, dealers and brokers under bond." (Congressional Record, 71st Congress, Part 2, page 2164.)

It is clear, therefore, that the absence of the bond pro-

vision in the Federal statute resulted from the express purpose of Congress, and that there is just as much conflict between it and the bond provision of the State statute as there is between the other sections of the two statutes.

IV.

THE PROVISIONS OF THE COMMISSION MERCHANTS ACT UNDER WHICH THIS BOND WAS EXACTED MUST BE REGARDED AS THOUGH THEY WERE INCORPORATED IN THE BOND.

THAT ACT BEING UNCONSTITUTIONAL AND VOID, THE BOND IS VOID AND UNENFORCEABLE AS AGAINST THE SURETY AS WELL AS THE PRINCIPAL.

It will be noted that the bonds sued on in this case refer directly to the statute in question (R., 4).

Moreover, it is a fundamental principle of law that where a bond is executed and delivered in accordance with the requirements of a statute, the bond must be construed as though the statutory provisions were incorporated in it.

Estate of Ramsey v. *People*, 197 Ill. 572.

And when the statute falls as void the bond falls with it.

This very question was passed upon by the Illinois Supreme Court in two cases, where it was held that if the statute requiring the license and bond was void as being unconstitutional, the bond was void not only as to the principal, but also as to the surety.

People v. *Federal Surety Co.*, 336 Ill. 472.

In this case the court sustained the right of a surety company to invoke the defense that the so-called Blue Sky Law of Illinois was unconstitutional in so far as it required a security dealer to furnish a bond, conditioned on his faithful compliance with the statute, and that the statute

being void the bond also was void. From the opinion it appears that under the statute referred to, all dealers in securities were required to procure a license before transacting such business, and as a part of the application for such license, to secure and deliver to the Secretary of State a bond containing the terms and conditions and in the form to be approved by him.

Gettelman & Company was a firm of investment bankers. It applied for a license and delivered a bond in accordance with the terms of the Act. Thereafter one of its customers claimed that Gettelman & Company had failed to comply with the statute and regulations, and brought suit in the name of the People of the State of Illinois against the surety.

The surety set up the defense that the statute was unconstitutional, and the Supreme Court of Illinois so held. But the State authorities contended that even if it were true that the statute was unconstitutional the surety was in no position to raise that defense. But the court in holding against that contention says, page 480:

> "Estoppel applies only against a person who has by his words or conduct induced a belief in the existence of a state of facts upon which another has been induced to act. *Gettelman & Co. in the absence of the statute had the right to engage in the business of dealer and broker in securities without giving any bond.*" (Italics ours.)

The court then reiterates the statement that the provision with reference to procuring the bond was unconstitutional, and then continues, on the same page:

> "Therefore Gettelman & Co. was not obliged as a condition of engaging in the business of dealer and broker in securities, to give a bond. The giving of the bond gave it no better right to engage in the business than it had without the bond. The bond was without consideration. The company received no benefit from it. Even if it was fraudulently given, the rule which

has been announced, that where the obligor has obtained and availed himself of the benefits to be derived from the execution of the bond he cannot defeat liability because of the unconstitutionality of the statute, does not apply. That rule requires that a party shall have availed himself, for his own benefit, of an unconstitutional law, but the facts are that the defendant did not and could not avail itself of the statute for its benefit. Without the law Gettelman & Co. had the right to engage in the business of dealer and broker in securities. It needed no license or permission to do so."

In *People* v. *Beekman & Co.*, 347 Ill. 92, the same question came up where the constitutionality of a subsequent Blue Sky Law was under discussion. That Act also provided that the security dealer had to procure a license from the State before entering business, and before procuring a license would have to put up a bond conditioned upon a faithful accounting by the security dealer. There was a breach of this bond, and in the suit brought upon it, the Supreme Court of Illinois, following the Federal Surety case, held the Act unconstitutional and bond void, and that the Surety Company had the right to raise that defense.

It was alleged that the security holder had breached the contract in making false representations contrary to the statute in connection with the sale of some stock, and that the security dealer had converted stock and failed to account for the money. The court again held that section 23 was unconstitutional and void. And the question again raised as to whether or not the Surety Company could interpose that defense was again thoroughly considered by the court, and the Federal Surety case above quoted was reaffirmed as follows, page 98:

> "Appellant contends that even if it be conceded that the classification is abritrary the surety cannot be heard to complain. This contention was decided to the contrary in *People* v. *Federal Surety Co., supra.*"

The principle laid down in these cases naturally flows

from the generic proposition with reference to the obligations of a surety that in the absence of special provisions to the contrary, those obligations are commensurate with the obligations of the principal, no greater, no less, as was said in 50 Corpus Juris, 74 (Principal and Surety):

> "In the absence of limitations or restrictions contained in the contract the liability of the surety is coextensive with that of the principal."

The same rule is stated in Childs on Suretyship, page 332, "The general rule is that the liability of the surety is commensurate with that of the principal."

> *Constable* v. *National Steamship Company,* 154 U. S. 51, 77.

This case was an action on a bond which had been exacted by the Federal authorities under a misconstruction of the statute with reference to the situation involved. This court in sustaining the defense of the surety that the bond was therefore void said, at page 78:

> "Beyond this it must be treated either as obtained by duress, or so plainly inconsistent with the previous agreement of the parties, *inter sese* as to be of no avail to the consignee.
>
> It is a familiar doctrine in this court that a bond or other obligation extorted by a public officer, under color of his office, cannot be enforced, and the remarks of this court in the case of *United States* v. *Tingey,* 5 Pet. 115, 129, are pertinent in this connection."

In another case, *Moses* v. *United States,* 166 U. S. 571, it appears that a bond was exacted by the Government from an Army Lieutenant, conditioned on his faithful accounting for moneys held by him. There was no statute involved, and therefore the bond was not void. There was no question of any illegal compulsion in connection with the bond. The court in so holding discusses the general proposition, and particularly refers to the case of *United*

States v. *Tingey*, 5 Pet. 115, quoted in the Constable case above cited, and then states (page 586):

> "The consideration or the condition of the bond must not be in violation of law; it must not run counter to any statute, it must not be either *malum prohibitum* or *malum in se*. Otherwise and for all purposes of security, a bond may be valid though no statute directs its delivery.
>
> We do not understand by the decision in Peters, above cited, that the meaning of the term 'voluntary bond' is that the bond must have been offered and pressed upon the Government when never asked for or demanded by it. It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted, in violation of any law or valid regulation of a department. Having the right to take a bond, the Government in a case like this has the right to demand it from the officer, and to say to him that if he do not give it he will not be continued as a 'property and disbursing officer of the Signal Service.' Such a demand when complied with does not amount to the illegal exaction and extortion of the bond. The case of a bond so procured differs radically from a case like that of *Tingey* (*supra*), inasmuch as the bond in the latter case was extorted from a reluctant officer with a condition therein contained different from that which the statute called for."

In the case before this court the bonds were extorted by the State officers *colore officii* under a statute which is void so far as the construction is concerned that they put upon it. And hence the bond is void to the extent of the same construction, namely, with reference to shipments from outside of the State.

Respectfully submitted,

J. F. DAMMANN,
ARTHUR L. ISRAEL,
SIDNEY K. JACKSON,
Attorneys for the Appellant.

WILSON & MCILVAINE,
Of Counsel.

APPENDIX "A".

ILLINOIS STATUTE.

COMMISSION MERCHANTS LAW.

Smith Hurd, Chap. 5, Sec. 17-24
Cahill, Chap. 5, Sec. 24-32.

AN ACT *to regulate the consignment and sale on commission of farm produce, and to repeal an Act therein named.* (Approved June 28, 1919, as amended.)

Terms Defined.] § 1. *Be It enacted by the People of the State of Illinois, represented in the General Assembly:*

(a) That the term commission merchant shall include every person, firm, exchange, association and corporation licensed under this Act to receive, sell or offer for sale on commission, within this State, any kind of farm produce; except where such farm produce is sold for consumption and not for resale. This Act shall not apply to the sale of farm produce at public auction by a duly licensed and bonded auctioneer, acting as the agent of another to whom such farm produce shall have been consigned; nor shall this Act apply to seeds sold at retail; nor shall this Act apply to grains and seeds which are classified into grades by any governmental or State Department duly created by any law of the State of Illinois or of the United States.

(b) The term "Farm Produce" shall include all agricultural, horticultural, floricultural, vegetable and fruit products of the soil, and poultry, wool, feathers, fur, hides, eggs, dairy products, nuts and honey, but shall not include timber products, tea or coffee.

(c) The word "Director" when used herein shall have reference to the Director of Agriculture.

License—Application—Fee.] § 2. On and after August first, Nineteen Hundred and Nineteen, no person, firm, exchange, association or corporation, shall receive, sell or offer for sale, or solicit consignments or shipments for sale on commission within this State, any kind of farm produce, without a license as provided in this Act. Every person, firm, exchange, association and corporation in this State

receiving farm produce for sale on commission shall annually, on or before June 1st, file an application with the Director of Agriculuture for a license to do a commission business in farm produce. Such applicant shall state the kind or kinds of farm produce which the applicant proposes to handle, the full name of the person, firm, exchange, association or corporation applying for such a license, and if the applicant be a firm, exchange, corporation or association, the full name of each member of the firm, or the names of the officers of the exchange, association or corporation, and the name of the local agent of the exchange or association, and the city, town or village and street number at which the business is to be conducted. Such applicant shall further satisfy the Director of his or its character, responsibility and good faith in seeking to carry on a commission business. The Director shall thereupon issue to such applicant, on payment of ten ($10) dollars and the execution and delivery of a bond as hereinafter provided, a license entitling the applicant to conduct the business of receiving and selling farm produce on commission at the place named in the application until the first day of July of the year next following. Seperate licenses and bonds shall be required for each location at which business is to be conducted; and such license shall be kept posted in the office of such licensee.

Applicant to Give Bond—Who May Bring Action.] § 3. Before any such license shall be issued every applicant shall execute and deliver to the Director of Agriculture an indemnity bond for five thousand ($5,000.00) dollars and with sureties satisfactory to the said Director. All bonds to be of a standard form as to terms and conditions, approved by the Director, and to secure an honest accounting and handling of produce received and for the payment to the consignor of all moneys or things of value received for goods consigned to such licensee for sale and to secure consignor against all fraudulent acts of said licensee in the sale or the handling of the goods of consignor. And the Director may bring an action in any court of competent jurisdiction in the county in which is situated the place of business of the licensee to recover payment for goods sold on commission and not paid to consignor, or not honestly accounted for, and for damages sustained by consignors by reason of such fraudulent acts and wrongful handling and if such licensee has become liable to more than one con-

signor, and the amount of the bond is insufficient to pay the entire liability, the consignors shall be compensated in proportion to their several claims, the said sums when collected to be promptly paid over to the parties entitled thereto. [As amended by Act approved June 29, 1927.]

Investigation—Notice of Hearing. § 4. The Director of Agriculure or his assistants shall have power to investigate, upon the verified complaint of an interested person, also to make an investigation irrespective of whether or not a complaint is filed, the record of any person, firm, exchange, corporation or association applying for a license, or any transaction involving the solicitation, receipt, sale or attempted sale of farm produce on a commission basis, the failure to make proper and true accounts and settlements at prompt and regular intervals, the making of false statements as to condition, quality or quantity of goods received or while in storage, the making of false statements as to market conditions, with intent to deceive, or the failure to make payment for goods received or other alleged injurious transactions; and for such purpose may examine at the place of business of the licensee, that portion of the ledgers, books of account, memoranda or other documents, relating to the transactions involved, of any commission merchant, and may take testimony therein under oath.

When a consignor of farm produce fails to obtain honest accounting in any transaction he shall within sixty (60) days after the shipment of the goods make a demand upon the consignee for either an honest accounting or payment for goods shipped. Ten days after making this demand, if an honest accounting or payment has not been received by the consignor, he shall file with the Director a copy of this demand together with an affiadvit setting forth the nature and amount of the goods consigned, the date of the consignment, and the amount he believes to be due and owing him, together with bills of lading and delivery receipts showing the goods were shipped to and received by the consignee. The Director shall attempt to secure an explanation or adjustment; failing this, within seven days after receipt of such complaint from consignor, he shall cause a copy thereof, together with a notice of a time and place for a hearing on such complaint, to be served personally or by mail upon such commission merchant. Such service shall be made at least seven days before the hearing, which shall be held in the city, village or township in which is sit-

uated the place of business of the licensee. At the time and place appointed for such hearing, the Director or his assistants shall hear the parties to such complaint, shall have power to administer an oath, and shall enter in the office of the Director at Springfield, a decision either dismissing such complaint or specifying the facts which he deems established on such hearing, and in case such facts are established as cause him to revoke such license, he shall bring an action on the bond within sixty days of the filing of such decision. (As amended by Act approved June 29, 1927.)

Refusal or Revocation of License.] § 5. The Director may decline to grant a license or may revoke a license already granted where he is satisfied of the existence of the following cases or any of them.

(a) Where false charges have been imposed for handling or services rendered.

(b) Where there has been a failure to account promptly and properly or to make settlements, with intent to defraud.

(c) Where there have been false statements as to condition, quality or quantity of goods received or held for sale on commission when the same might be known on reasonable inspection.

(d) Where there has been false or misleading statement or statements as to market conditions with intent to deceive.

(e) Where there has been a combination or combinations to fix prices.

(f) Where the commission merchant directly or indirectly purchases the goods for his own account without prior authority therefor or without notifying the consignor thereof.

(g) Where the commission merchant is in bankruptcy or in insolvency, or where the Director has reason to believe that bankruptcy or insolvency may shortly occur.

(h) Where there has been a continued course of dealing of such a nature as to satisfy the Director of the inability to properly conduct the business of commission merchant, or of the intent to deceive or defraud shippers.

(i) Where a licensee has been guilty of fraud or deception in obtaining his license.

(j) Where the licensee neglects to file a new bond when

notified by the Director that the bond already filed is unsatisfactory.

Action Subject to Review.] § 6. The action of the Director in refusing to grant a license, or in revoking a license granted under this Act, shall be subject to review by a writ of certiorari, and if such proceedings are begun, until the final determination of the proceedings and all appeals therefrom, the license of such commission merchant shall be deemed to be in full force and effect, provided the fees for such license shall have been paid and a bond given as herein required.

Commission Merchants to Keep Record of Produce.] § 7. Every commission merchant shall, upon the receipt of farm produce, and as he handles and disposes of the same, make a record thereof, specifying the name and address of the consignor, the date of receipt, the kind and the quantity of such produce, the condition of the goods upon receipt by licensee, the amount of goods sold, the date of sale, the name and address of the person to whom the goods are sold, his license number where the same can be secured with reasonable diligence, the price received and the items of expense connected therewith; and a memeorandum of this record except as to the names and addresses of purchasers of such goods, together with payment in settlement for such shipment, shall be mailed to the consignor within forty-eight hours unless otherwise agreed. The commission merchant shall retain the foregoing record for a period of six months and the same shall be open to the inspection of the Director or his agents. The burden of proof shall be upon the commission merchant to prove the correctness of his records as to any transactions which may be questioned.

Penalty.] § 8. Any person, firm, exchange, association or corporation who shall receive or offer to receive, sell, or offer to sell on commission within this State any kind of farm produce without a license except as in this Act permitted and any person who being a commission merchant in farm produce shall (a) impose false charges for handling or services in connection with farm produce, or (b) fails to account for such farm produce promptly and properly and to make settlements thereof, with intent to defraud, or (c) shall make false or misleading statement or statements as to market conditions with intent to deceive, or, (d) enter into any combination or combinations to fix prices, or (e) directly or indirectly purchases for his or its own account,

goods received by him or it upon consignment without prior authority therefor from the consignor, or shall fail to promptly notify the consignor of such purchase on his or its own account, or (f) any person handling, shipping or selling farm produce who shall make false statements as to grade, condition, markings, quality or quantity of goods shipped, or packed in any manner, with intent to deceive, or (g) shall fail to comply in every respect herewith, or (h) shall advertise or hold one's self out as a commission merchant in farm produce without a license, shall be guilty of a misdemeanor, and punished by a fine of not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars.

All fines imposed and collected under this Act shall be paid within thirty days after such collection to the Department of Agriculture and by it paid into the State treasury. (As amended by Act approved June 29, 1927.)

APPENDIX "B".

Federal Statute.

TEXT OF THE ACT.

[46 Stat. 531—71st Congress.]

An act to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when use in this Act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia;

(4) The term "perishable agricultural commodity" means any of the following, whether or not frozen or packed in ice: Fresh fruits and fresh vegetables of every kind and character;

(5) The term "commission merchant" means any person engaged in the business of receiving in interstete or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;

(6) The term "dealer" means any person engaged in the business of buying or selling in carloads any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect of sales of any such commodity of his own raising; and (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" in respect of any such commodity in any calendar year until his purchases of such commodity in carloads in such year are in excess of twenty. Any person not considered as a "dealer" under clauses (A) and (B) may elect

to secure a license under the provisions of section 3, and in such case and while the license is in effect such person shall be considered as a "dealer." As used in this paragraph, the term "in carloads" includes corresponding wholesale or jobbing quantities as defined for any such commodity by the Secretary;

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively;

(8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act.

UNFAIR CONDUCT.

SEC. 2. It shall be unlawful in or in connection with any transaction in interstate of foreign commerce—

(1) For any commission merchant or broker to make any fraudulent charge in respect of any perishable agricultural commodity received in interstate or foreign commerce;

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought or sold in interstate or foreign commerce by such dealer;

(3) For any commission merchant to discard, dump, or destroy without reasonable cause any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce;

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement concerning the condition, quality, quantity, or disposition of, or the condition of the market for, any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold or contracted to be bought or sold in such commerce by such dealer; or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account promptly in respect of any such transaction in any such commodity to the person with whom such transaction is had;

(5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to represent by word, act, or deed that any perishable agricultural commodity received in interstate or foreign commerce was produced in a State or in a country other than the State or the country in which such commodity was actually produced;

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate under authority of any Federal or State inspector as to the grade of quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

LICENSES.

SEC. 3. (a) After the expiration of six months after the approval of this Act no person shall at any time carry on the business of a commission merchant, dealer, or broker without a license valid and effective at such time. Any person who violates any provision of this subdivision shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(b) Any person desiring any such license shall make application to the Secretary. The Secretary may by regulation prescribe the information to be contained in such application. Upon the filing of the application, and annually thereafter, the applicant shall pay a fee of $10.

SEC. 4. (a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided in subdivision (b) of this section, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, but said license shall automatically terminate unless the annual fee is paid within thirty days after notice has been mailed that payment is due.

(b) The Secretary shall refuse to issue a license to an applicant if after notice and hearing he finds (1) that the applicant has previously been responsible in whole or in part for any violation of the provisions of section 2 for which a license of the applicant, or the license of any partnership, association, or corporation in which the applicant held any office or, in the case of a partnership, had any share or interest, was revoked, or (2) in case the applicant is a partnership, association, or corporation, that any individual holding any office or, in the case of a partnership, having any interest or share in the applicant, had previously been responsible in whole or in part for any violation of the provisions of section 2 for which the license of such individual, or of any partnership, association, or corporation in which such person held any office, or, in the case of a partnership, had any share or interest, was revoked. Notwithstanding the foregoing provisions, the Secretary, in the case of such applicant, may issue a license if the applicant furnishes a bond or other satisfactory assurance that his business will be conducted in accordance with the provisions of this Act, but such license shall not be issued before the expiration of one year from the date of such revocation.

LIABILITY TO PERSON DAMAGED.

SEC. 5. (a) If any commission merchant, dealer, or broker violates any provision of paragraph (1), (2), (3), or (4) of section 2 he shall be liable to the persons or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now ex-

isting at common law or by statute, and the provisions of this Act are in addition to such remedies.

COMPLAINT AND INVESTIGATION.

SEC. 6. (a) Any person complaining of any violation of any provision of section 2 by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Secretary.

(b) Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any employee of the United States Department of Agriculture or any interested person, may file, in accordance with rules and regulations of the Secretary a complaint of any violation of any provision of section 2 by any commission merchant, dealer, or broker, and may request an investigation of such complaint by the Sercetary.

(c) If there appear to be, in the opinion of the Secretary, any reasonable grounds for investigating any complaint made under this section, the Secretary shall investigate such complaint and may, if in his opinion the facts warrant such action, have said complaint served by registered mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the said person is engaged in business.

(d) After an opportunity for a hearing on a complaint the Secretary shall determine whether or not the commission merchant, dealer, or broker has violated any provision of section 2.

(e) In case complaint is made by a nonresident of the United States before any action is taken thereon, that the complainant shall be required to furnish a bond double the amount of the claim, the bond to be conditioned upon the payment of costs, including attorney's fees of respondents, in case of failure to sustain the case.

REPARATION ORDER.

SEC. 7. (a) If after a hearing on a complaint made by any person under section 6 the Secretary determines that the commission merchant, dealer, or broker has violated any provision of paragraph (1), (2), (3), or (4) of section 2, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order.

(b) If any commission merchant, dealer, or broker does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the commission merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent state of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

SUSPENSION AND REVOCATION OF LICENSE.

SEC. 8. Whenever the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, he may publish the facts and circumstances of such violation and/or by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is a flagrant or repeated violation of such provisions, the Secretary may, by order, revoke the license of the offender.

ACCOUNTS AND RECORDS.

SEC 9. Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period of not to exceed ninety days.

EFFECTIVE DATE AND FINALITY OF ORDER.

SEC. 10. Any order of the Secretary under this Act other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained.

INJUNCTIONS.

SEC. 11. For the purposes of this Act the provisions of all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting aside in whole or in part, of the orders of the Interstate Commerce Commission are made applicable to orders of the Secretary under this Act and to any person subject to the provisions of this Act.

GENERAL PROVISIONS.

SEC. 12. The Secretary may report any violation of this Act for which a civil penalty is provided to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay. The costs and

expenses of such proceedings shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 13. (a) In the investigation of complaints under this Act, the Secretary or his duly authorized agents shall have the right to inspect such accounts, records, and memoranda of any commission merchant, dealer, or broker as may be material for the determination of any such complaint. If any such commission merchant, dealer, or broker refuses to permit such inspection, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender until permission to make such inspection is given.

(b) The Secretary, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence, and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records, and memoranda as may be material for the determination of any complaint under this Act.

(c) In case of disobedience to a subpoena, the Secretary or any of his examiners may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of accounts, records, and memoranda. Any district court of the United States within the jurisdiction of which any hearing is carried on may, in case of contumacy or refusal to obey a subpoena isued to any person, issue an order requiring the person to appear before the Secretary or his examiner or to produce accounts, records, and memoranda if so ordered, or to give evidence touching any matter pertinent to any complaint; and any failure to obey such order of the court shall be punished by the court as a contempt thereof.

(d) The Secretary may order testimony to be taken by deposition in any proceeding or investigation or incident to any complaint pending under this Act at any stage thereof. Such depositions may be taken before any person designated by the Secretary and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition or under his direction and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce accounts, records, and memoranda in the same manner as witnesses may be compelled to appear and testify and produce

accounts, records, and memoranda before the Secretary or any of his examiners.

(e) Witnesses summoned before the Secretary or any officer or employee designated by him shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like service in the courts of the United States.

(f) No person shall be excused from attending, testifying, answering any lawful inquiry, or deposing, or from producing any documentary evidence, before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary or any such officer or employee, in any cause or proceeding, based upon or growing out of any alleged violation of this Act, or upon the taking of any deposition herein provided for, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he is compelled under oath so to testify, or produce evidence, documentary or otherwise, before the Secretary or any officer or employee designated by him, in obedience to the subpoena of the Secretary, or any such officer or employee, or upon the taking of any such deposition, or in any such cause of proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 14. The Secretary is hereby authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies, and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without regard to the filing of a complaint under this Act, to any interested person the class, quality, and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to

cover the cost for the service rendered: *Provided,* That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the terms of his contract of employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: *Provided further,* That expenses for travel and subsistence incured by inspectors shall be paid by the applicant for inspection to the disbursing clerk of the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this Act: *And provided further,* That certificates issued by such inspectors shall be received in all courts of the United States as prima facie evidence of the truth of the statements therein contained.

SEC. 15. The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act, and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing binding, telegrams, telephones, law books, books of reference, publications, furniture, stationery, office equipment, travel, and other supplies and expenses, including reporting services, as shall be necessary to the administation of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose. This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto.

SEC. 16. In construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission

merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

SEPARABILITY.

SEC. 17. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

SHORT TITLE.

SEC. 18. This Act may be cited as the "Perishable Agricultural Commodities Act, 1930."

Approved, June 10, 1930.

FILE COPY

MAR 31 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF FOR APPELANT.

J. F. DAMMANN,
ARTHUR L. ISRAEL,
SIDNEY K. JACKSON,
Counsel for Appellant.

WILSON & McILVAINE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

It is contended by the appellee in this Court as in the Supreme Court of Illinois that the Illinois Act covers both State and interstate commerce (State's brief 8).

One of the points made in support of this proposition is that Congress has recognized the right of the State to make concurrent legislation with reference to agricultural products (page 5.V, and page 27).

It invokes in this connection the section of the Federal statute quoted in our brief in chief at page 13. (See also page 27 of State's brief.)

The position is that Congress specifically reserved the right to the States to enact laws covering the same subject matter.

But we submit that the statutory provision precludes any such construction. It specifies "except insofar only as they are inconsistent herewith or repertinent hereto".

The statutory provisions here involved are mutually exclusive.

Consider the basic provisions of the two statutes with reference to licenses.

The Federal statute says you cannot engage in this business without a license (Sec. 3a).

It then says that unless the secretary refuses to issue a license for the reasons stipulated in the act (4b) the secretary "*shall* issue to such applicant a license which shall entitle the licensee to do business as a commercial merchant, etc." (Italics ours.)

So that an applicant would be entitled to a license as *a matter of right* to do that business.

The Illinois Act provides the same. It says you cannot do this business without a license (Sec. 1). It then provides that except in the case of refusal or revocation for a reason specified in the statute "the director *shall* thereupon issue to such applicant a license entitling the applicant to conduct the business, etc." (Italics ours.)

It is obvious, therefore, that if the Illinois Act is to be given an interstate effect a commission merchant with a Federal license (directly contrary to the Federal statute), would not be permitted to do that business.

The same is true with reference to the bond:

The Federal Act says you are *entitled* to a license without a bond. The State statute says you *cannot get* a license without a bond.

Hence, if an applicant for Federal license secured one he could not operate without the Illinois license. Again directly contrary to the Federal act.

The Congress not only left out the provision requiring a bond, and did so on purpose, as pointed out in our brief in chief, but the act expressly provides (Sec. 4b) that the secretary may in certain cases of a bad record, etc. issue a license when a bond is furnished.

We submit, therefore, that the provisions of the two acts are mutually exclusive, inconsistent, and repugnant.

Respectfully submitted,

J. F. DAMMANN,
ARTHUR L. ISRAEL,
SIDNEY K. JACKSON,
Attorneys for Appellant.

WILSON & MCILVAINE,
Of Counsel.

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 10 1936
CHARLES ELMORE CROP
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 692

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS Ex Rel. WALTER W. McLAUGHLIN, Director of Agriculture.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION.

Otto Kerner,
Attorney General of Illinois.

Louis Salinger,
Assistant Attorney General of Illinois.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1

Table of Cases Cited.

Bacon v. Illinois, 227 U. S. 504	3
Caldwell v. Sioux Falls Stock Yards Co., 242 U. S. 559	2
Hall v. Geiger-Jones Co., 242 U. S. 539	2
Merrick v. Halsey & Co., 242 U. S. 568	2
Minnesota v. Blasius, 290 U. S. 1	2
Minnesota Rate Cases, 230 U. S. 352	2
Mintz et al. v. Baldwin, 289 U. S. 346	2
Munn v. Illinois, 94 U. S. 113	3
Patapsco Guano Co. v. North Carolina, 171 U. S. 345	2
Pennsylvania v. Hughes, 191 U. S. 477	2
Plumley v. Massachusetts, 155 U. S. 461	2
Savage v. Jones, 225 U. S. 501	2
Schechter Poultry Corporation et al. v. United States, 295 U. S. 495	2
Sherlock v. Elling, 93 U. S. 99	3
Sligh v. Kirkwood, 237 U. S. 52	2
South Covington & Cincinnati Street Railway Co. v. City of Covington, 235 U. S. 537	2
Wiloil Corporation v. Pennsylvania, 294 U. S. 169	2

Statutes Cited.

Commission Merchants Act (Ill. Session Laws, 1919, p. 14, Revised Statutes, 1935, Chap. 5, Pars. 24-32, pp. 75-77)	2
Judicial Code, Section 237, as amended (28 U. S. C. A. 344)	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 692

HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL., WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

Consolidated Causes.

Nos. 22532-22533.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL., WALTER W. McLAUGHLIN, DIRECTOR OF AGRICULTURE,
(Plaintiff), Appellee,

vs.

G. H. CROSS COMPANY, A CORPORATION, AND HARTFORD ACCIDENT & INDEMNITY COMPANY, A CORPORATION,
Defendants.

ON APPEAL OF HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION, APPELLANT.

STATEMENT BY APPELLEE OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF ABOVE COURT, PURSUANT TO SUPREME COURT RULE 12.

MAY IT PLEASE THE COURT:

The appellee states the following matters and grounds against the jurisdiction of this Court as asserted by the

appellant herein, in its statement of the basis of appellate jurisdiction filed herein on the 5th day of December, 1935, as required by Rule 12 of the Supreme Court.

I. The statutes relied on by appellant herein to sustain appellate jurisdiction of this Court, *ie*, Sec. 237 Judicial Code of the United States as amended 28 (U. S. C. A., Sec. 344) is not applicable to this case for the reason that said Commission Merchants Act (Ill. Session Laws 1919, p. 14, Revised Statutes 1935, Chap. 5, Pars. 24-32, pp. 75-77) in no manner places a burden on interstate commerce for the reason said act was passed by the legislature of the State of Illinois in exercise of police power of the State.

II. In support of this contention appellee cites the following cases:

Schechter Poultry Corporation et al v. *United States*, 295 U. S. 495.

Wiloil Corporation v. *Pennsylvania*, 294 U. S. 169.

Minnesota v. *Blasius*, 290 U. S. 1.

Mintz et al v. *Baldwin*, 289 U. S. 346.

Hall v. *Geiger-Jones Co.*, 242 U. S. 539.

Caldwell v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559.

Merrick v. *Halsey & Co.*, 242 U. S. 568.

Sligh v. *Kirkwood*, 237 U. S. 52.

South Covington & Cincinnati Street Railway Co. v. *City of Covington*, 235 U. S. 537.

Minnesota Rate Cases, 230 U. S. 352.

Savage v. *Jones*, 225 U. S. 501.

Pennsylvania v. *Hughes*, 191 U. S. 477.

Patapsco Guana Co. v. *North Carolina*, 171 U. S. 345.

Plumley v. *Massachusetts*, 155 U. S. 461.

Bacon v. *Illinois*, 227 U. S. 504.
Sherlock v. *Elling*, 93 U. S. 99.
Munn v. *Illinois*, 94 U. S. 113.

December 18, 1935.

Respectfully submitted,

OTTO KERNER,
Attorney General of the State of Illinois,
Attorney for Appellee.
LOUIS SALINGER,
Assistant Attorney General,
Of Counsel.

(7331-C)

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

(October Term, 1935)

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel.
WALTER W. McLAUGHLIN, Director of Agriculture.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

~~REPLY~~ BRIEF FOR APPELLEE.

OTTO KERNER,
Attorney General of Illinois,
Attorney for Appellee.

Louis Salinger,
Assistant Attorney General,
Of Counsel.
33 North LaSalle Street,
Chicago, Illinois.

PHILLIPS BROS. PRINT, SPRINGFIELD, ILL.

SUBJECT INDEX.

	Page
Statement	1
Summary of Argument	5
Argument:	
I. Similar commission merchants acts have been construed by this court and by various state courts and sustained	7
II. The Commission Merchants Act is not violative of the Interstate Commerce Law because it affects commerce incidentally and only remotely	8
III. The State may require payment of an occupation tax from one engaged in interstate commerce	15
IV. Where a police power of the State is involved, an act of the legislature to prevent fraud on the public, although incidentally interfering with interstate commerce is, nevertheless, valid	24
V. Federal Congress has recognized the right of the States to make concurrent legislation with reference to agricultural products	27
VI. It is now to late for the principal, hence the surety, to raise the constitutionality of the act in controversy, having been in business a great many years and proceeded under the act. Therefore, what applies to the principal equally applies to the surety, and since the principal has not deemed it advisable to defend the bond the appellant is in no position so to do	29
Statutes Cited:	
Idaho, Annotated Code, 1932, Section 22, Paragraph 1001, *et seq.*	24
Indiana Statutes, 1932, Section 10-213	24
California—Producers Act, 6155—General Laws of California	24
Louisiana—Farm Product Dealers General Statutes, 1932, Section 207-208, Chapter 15	24

Page

Michigan—Compiled Laws, 1929. Section 9738.. 25

Minnesota—Mason's Minnesota Code, 1927. Section 197, *et seq*..... 25

Missouri, 4113-4115. Section 10077..... 25

New York—Cahill's Consolidated Laws of New York, 1930. Article 21, Section P. 244, *et seq*... 25

Ohio, page 5 Annotated Code, Chapter 4-A..... 25

CASES CITED.

Arnold et al. v. Hannah & Anderson, 276 U. S. 591.... 8

Bacon v. Illinois, 227 U. S. 504..... 17

Baldwin v. G. A. F. Seelig, 294 U. S. 511..... 18

Baldwin v. Standard Accident Insurance Company, 261 N. Y. S. 507..... 7

Bedford Company v. Stone Cutters Association, 274 U. S. 37..... 18

Caldwell v. Sioux Falls Stock Yards Company, 242 U. S. 559..... 25

Cargill Co. v. Minnesota, 180 U. S. 452..... 14

Cooney v. Mountain States Telep. & Teleg. Co., 294 U. S. 384..... 26

Corson v. Maryland, 120 U. S. 502..... 22

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282..... 21

Detroit Int. Bridge Co. v. Corporation Tax Board, 287 U. S. 294..... 30

DiSanto v. Pennsylvania, 273 U. S. 34..... 19

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465... 23

Edelman v. Boeing Air Transport, 289 U. S. 249..... 10

Federal Trades Commission v. Pacific States Paper Trade Association, 273 U. S. 52..... 22

Furst v. Brewster, 282 U. S. 493..... 22

Hall v. Geiger-Jones, 242 U. S. 539..... 25

Page

Hopkins v. United States, 171 U. S. 578 16

Interstate Busses v. Holyoke Street Railway Company, 273 U. S. 45 20

International Shoe Company v. Pincus, 278 U. S. 261 .. 28

Kansas City Steel Company v. Arkansas, 269 U. S. 148 21

Local 167, International Brotherhood of Teamsters, etc. v. United States, 291 U. S. 293 23

Merrick v. N. W. Halsey, 242 U. S. 568 25

Minnesota v. Blasius, 290 U. S. 1 8

Moore v. N. Y. Cotton Exchange, 270 U. S. 593 22

Moses v. United States Indemnity Co., 166 U. S. 571 .. 30

Moulton v. Williams Fruit Corp., 14 Pac. (2nd) 88, affirmed 21 Pac. (2nd) 936 7

Nashville C. & St. L. R. Co. v. Wallace, 288 U. S. 249 .. 10

Osborne v. Florida, 164 U. S. 650 15

Payne v. Kansas ex rel. Brewster, 248 U. S. 112 7

People v. Jarvis, 27 Pac. (2nd) 77 7

Plumley v. Massachusetts, 155 U. S. 461 11

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692 16

Raley Bros. v. Richardson, 264 U. S. 157 12

Rast v. Van Damen, 240 U. S. 342 26

Real Silk Hosiery Co. v. Portland, 268 U. S. 325 20

Robbins v. Shelby County Taxing District, 120 U. S. 489 23

Shafer v. Farmers' Grain Company, 268 U. S. 189 ... 13

Sherlock et al. v. Alling, 93 U. S. 99 14

Sligh v. Kirkwood, 237 U. S. 52 16

Sprout v. City of South Bend, 277 U. S. 163 22

Stafford v. Wallace, 268 U. S. 495 16

State ex rel. Beek v. Wagener, 77 Minn. 483 7

Page

Stockard v. Morgan, 185 U. S. 27..... 18

Texas Transport & T. Co. v. New Orleans, 264 U. S. 150 19

United States v. Bradley, 10 Pet. 343, 39 L. Ed. 448... 31

United States v. Hodson, 10 Wal. 406, 19 L. Ed. 937.. 31

Ware and Leland v. Mobile County, 209 U. S. 405..... 22

Watters v. Michigan, 248 U. S. 65..... 12

12 Corpus Juris, 762..... 29

IN THE

SUPREME COURT OF THE UNITED STATES

(October Term, 1935)

No. 692

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel.
WALTER W. McLAUGHLIN, Director of Agriculture.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OF FACTS.

Counsel for appellant have in their brief made a complete and ample statement of the facts in this case. The constitutionality of an Act by the State of Illinois, known as the "Commission Merchants Act," passed by the legislature of the State of Illinois in the year 1919, is challenged. (Appellant's brief, Appendix A.)

The question may be stated as follows: Has the State of Illinois the right to license commission merchants who

are engaged in the business of receiving shipments both from beyond the State of Illinois and within the State of Illinois, which shipments come into their hands and are held by them as brokers for the purpose of sale, such brokers being engaged both in receiving shipments from other states, as well as within the State of Illinois?

In substance, the Act of the Legislature of the State of Illinois, among its provisions, provides that before a license shall be issued, the person or firm to whom such license is issued shall file a bond to be approved by the Director of Agriculture of the State of Illinois, providing that said commission merchant will honestly account for the handling of produce received and for the payment to the consignors of money or things of value received for goods consigned to said licensee for sale, and to secure the consignor from any fraudulent acts in such sale and handling of goods of said consignor.

The consignments generally refer to farm products and are considered as perishable merchandise. The G. H. Cross Company, a corporation, obtained a license from the State of Illinois for the years commencing on the 1st day of July, 1931, to the 1st day of July, 1932, and subsequently another license from the 1st day of July, 1932, to the 1st day of July, 1933, having previously been in business for a number of years.

On November 4, 1932, the G. H. Cross Company was adjudged a bankrupt. Thereafter two suits were brought against the bankrupt as principal, and the Hartford Acci-

dent & Indemnity Company as surety on said bonds. These actions (afterwards consolidated) were commenced in the Municipal Court and were premised upon liability incurred by the said G. H. Cross Company to shippers and consignors of farm produce. The appellant was surety on both bonds.

In the year 1931, one G. H. Segerstrom of East Farms, Washington, a consignor, was a creditor of the Cross Company for $608.15, and judgment was obtained against the Hartford Company. In the year 1932, the Cross Company became indebted to various shippers whose shipments came from the State of Illinois, and principally from shipments arriving from out of the State. The Cross Company failed to defend both of said actions in the lower court and judgments were rendered on the respective bonds for the years 1931 to 1932, and the years 1932 to 1933, in the sums of $608.15 and $5,000. (See stipulation of facts, page 12 Record, folio 72.)

For our purpose, we find it necessary to emphasize some facts, setting forth the elements of the business of commission merchants. It seems that other merchants besides the Cross Company were engaged in similar lines of business. The perishable condition of the commodities makes it necessary for commission merchants to dispose of the products quickly and to the best interest of their consignors. Much reliance, therefore, must be given to their activities, and to the stability, honesty and fair dealing on their part as brokers. It is common knowledge that a farmer is usually located in small communities not equipped to give him in-

formation as to the credit and financial responsibility of his factor or broker. If the broker is dishonest, he can, by improper market manipulations, easily defraud the farmer. The case of the shipment of apples referred to in the stipulation of facts is typical of the nature of the broker's business. (Statement of Claims, Transcript 1 and 22.)

One G. H. Segerstrom, plaintiff in the first suit, made a shipment of apples to the Cross Company, which apples were placed in cold storage as was the custom of merchants handling carloads of apples. The Cross Company deducted charges for such service, including cost of cold storage, and made an accounting. Some months passed before the consignor received an accounting for such consignment, but no payment therefor, the apples having been shipped on or about October 13, 1931, and were sold at different dates prior to July 13, 1932 (about nine months) for the purpose of getting the best price. (Stipulation—Transcript 16, Paragraph 12.)

The stipulation of facts is silent as to whom and where such apples were sold, but from the nature of such transactions, we must assume that the merchant receiving carloads of apples, divided them into smaller lots and then disposed of them at different times, as was done in the Segerstrom case.

SUMMARY OF ARGUMENT.

I.

The similar Commission Merchants Acts have been construed by this Court and by various state courts, and sustained.

II.

The Commission Merchants Act is not violative of the Interstate Commerce Law because it affects commerce incidentally and only remotely.

III.

The State may require payment of an occupation tax from one engaged in interstate commerce.

IV.

Where a police power of the state is involved, an Act of the legislature to prevent fraud on the public, although incidentally interfering with interstate commerce is, nevertheless, valid.

V.

Federal Congress has recognized the right of the State to make concurrent legislation with reference to agricultural products.

VI.

It is now too late for the principal, hence the surety, to raise the constitutionality of the Act in controversy, hav-

ing been in business a great many years and proceeded under the Act. Therfore, what applies to the principal equally applies to the surety. And since the principal has not deemed it advisable to defend the bond the appellant is in no position so to do.

ARGUMENT.

I.

SIMILAR COMMISSION MERCHANTS ACTS HAVE BEEN CONSTRUED BY THIS COURT AND BY VARIOUS STATE COURTS AND SUSTAINED.

We believe that this court has approved the doctrine as laid down in the case of *Payne* v. *Kansas ex rel Brewster,* 248 U. S. 112, and courts of various states followed along the same line of reasoning. We refer to the cases of *Baldwin* v. *Standard Accident Insurance Company,* 261 N. Y. S. 507, affirmed, 237 App. Div. 334, and *Moulton* v. *Williams Fruit Corp.,* 14 Pac. (2nd) 88, affirmed 21 Pac. (2nd), 936 and *State ex rel Beek* v. *Wagener,* 77 Minn. 483; *People* v. *Jarvis,* 27 Pac. 2nd, 77.

This court in the case of *Payne* v. *Kansas ex rel Brewster,* 248 U. S. 112, in a memorandum opinion sustaining a similar statute of the State of Kansas said: (at page 113)

> "Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the states concerning matters of this kind, and we think the present record fails to show that these limitations have been transcended. *Rast* v. *VanDeman & L. Co.,* 240 U. S. 342, 60 L. ed. 679, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; *Brazee* v. *Michigan,* 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917 C. 522; *Adams* v. *Tanner,* 244 U. S. 590, 61 L. ed. 1336, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973."

This case is quoted with approval in *Arnold et al* v. *Hannah & Anderson,* 276 U. S. 591, 592.

We fail to find a single case juridically decided by any court of last resort adversely on the validity of similar statutes, although such statutes have been enacted by numerous states and have remained in force for many years.

However, we find it incumbered on us to make a lengthy argument in this case for the reason that the appellants have raised some issues which may not have been decided by this honorable Court in the Kansas case and in order to do so, we have deemed it advisable to treat at length the question as to whether the Statute of Illinois is a burden on interstate commerce.

II.

THE COMMISSION MERCHANTS ACT IS NOT VIOLATIVE OF THE INTERSTATE COMMERCE LAW BECAUSE IT AFFECTS COMMERCE INCIDENTALLY AND ONLY REMOTELY.

The State joins issue on the argument made on point I by the appellant and says that the Act which the Court is required to construe is not violative of any of the provisions of the Interstate Commerce Law, nor is the same a burden on commerce. The Commission Merchants Act covers a broad field and covers both merchants receiving produce in interstate as well as interstate shipments.

This Court, in the case of *Minnesota* v. *Blasius,* 290 U. S. 1, decided in the October 1933, term, annunciated the doctrine of merchandise coming *to rest* in the State. Chief

Justice Hughes rendered the opinion of the Court. The facts are fully stated in the opinion of the Chief Justice.

The Court finds referring to the facts, speaking of cattle, which came to rest in the State, says on p. 6:

> "That they were held at his pleasure and that he would sell to anyone, resident or non-resident, who was the highest bidder; that Blasius did not buy the cattle for the purpose of export or shipment to another state; and that after their purchase by him and until he resold the cattle were 'at the absolute and complete rest in the yards at South St. Paul' and 'were a part of the general mass of cattle in the state and locally owned.' "The Court also found that the cattle were handled by the defendant as a part of the chain of title from the original purchaser thereof to the final consumer thereof' and that such handling was 'a necessary factor in the center of the chain commerce from West to the East and South.' "

Reasoning from this decision of such late date, one can come to only one conclusion—that the Supreme Court of the United States has distinguished to a large degree all previous cases in conflict therewith. Analogous to the one at bar it seems to law down the broad principles that where the merchandise has come into the state "for rest in the state" as was done in the Segerstrom and other consignments to the Cross Company, then, at that point, the interstate nature of the shipment ceases and it comes under the supervision of the rules and laws of the state in which it came at rest. We submit to this Court that this case is a leading one and negatives the arguments made by appellant in their Point I in which they cite numerous cases to sustain their contention.

Nashville C. & St. L. R. Co. v. *Wallace,* 288 U. S. 249, is a case wherein the State of Tennessee imposed an excise tax on gasoline shipped by a railroad which gas was temporarily stored in the State, but used by said railroad in interstate commerce. The Court, at page 266, said:

> "The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation * * * the fact that the oil was, later withdrawn from storage for use some within and some without the State part of it thus becoming again the subject of interstate transportation did not affect the power of the State to tax it all before that transportation commenced. Neither the appellant the shippers nor the carrier at the time of the shipment of the gasoline from points of origin arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it when seggregated for that purpose would again be transported across state boundaries appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. As nothing in the transaction before the withdrawal from storage in Tennessee can be said to have given any ascertainable part of the gasoline a destination to points beyond the state the case is distinguishable from Carson Petroleum Co. * * *"

Reading a little further this Court's opinion uses the following language:

> "It cannot be doubted that when gasoline comes to rest in storage the state was as free to tax notwithstanding its prospective use as an instrument of interstate commerce as it was to tax appellant's right of way rolling stock or other instruments of interstate commerce which are subject to local property tax." (Citing decisions.)

The last mentioned case was quoted with approval in *Edelman* v. *Boeing Air Transport,* 289 U. S. 249, 251 and

252, involving the question as to whether the State of Wyoming could tax gasoline used by the Transport Company and stored temporarily in Wyoming for the purpose of being used in interstate transportation by the Boeing Company while conducting air mail and transportation of passengers in interstate commerce. The Court said, at page 252:

> "The stored gasoline is to be deemed 'used within the state and, therefore, subject to the tax when it was withdrawn from the tanks' (citing various decisions)."

In *Plumley* v. *Massachusetts,* 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223, Mr. Justice Harlan, writing the opinion of the Court on question here at issue said, on page 468:

> "If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the statute of Massachusetts, to manufacture it in that State, or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

The case of *Watters* v. *Michigan*, 248 U. S. 65. A city ordinance was enacted regulating peddling and canvassing from house to house for sale of goods in the City of Munsing, Michigan. In this case the Court said: Page 66

> "It may be assumed that the greater part of his business was interstate commerce and free from any obligation that the ordinance imposed, but in the course of his business, he did sell two cans of toilet cream that were at rest in the State before the selling and it is admitted that this transaction was not protected from state legislation." Citing, *Bacon* v. *Ill.*, 227 U. S. 504.

In the case at bar, it is admitted that the G. H. Cross Company did some intrastate business and it is further evidenced that it did handle the apples from Segerstrom by leaving them at rest in the State of Illinois in cold storage.

The case of *Raley Bros.* v. *Richardson*, 264 U. S. 157, is similar in facts to the instant case. It seemed that the facts show the State of Georgia imposed a flat tax of $100 "upon any broker or commission merchant buying or selling merchandise on commission for another or engaged in the business of receiving or distributing articles of merchandise shipped to said broker or merchant for distribution on account of shipper." An injunction was filed seeking to restrain the state from prosecuting the broker for failure to pay said tax. In this case, the contention was that the tax is laid on all brokers and commission merchants in the state on business done by them, whether interstate or intrastate without separating one from the other. We quote from the opinion of Justice Sutherland as follows: Page 159.

"The complainants were definitely engaged in the domestic business described in the statute and were liable to the tax, irrespective of the extent of it and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, by the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer* v. *Stewart*, 197 U. S. 60, 69. Incidentally, one cannot avoid a tax upon a taxable business by also engaging in a non-taxable business."

We quote, therefore, with approval from *Shafer* v. *Farmers' Grain Company*, 268 U. S. 189, on page 201 (cited by appellant page 34) where the Court says as follows:

"In *Munn* v. *Illinois*, 94 U. S. 113, 123, 135, the question was whether, as respects an elevator devoted to storing grain for hire, the State could regulate the storage charge where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce. The Court held such a regulation admissible because of the public character of the elevator and because interstate commerce was affected only incidentally and remotely. No restriction on buying or shipping was involved. In *Cargill Co.* v. *Minnesota*, 180 U. S. 452, the Court had before it a State statute, much of which had been pronounced unconstitutional by the State Court. In sustaining a provision which remained, the Court said, p. 470: 'the statute puts no obstacle in the way of purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased.' Plainly the case is not in point here. In *Merchants Exchange* v. *Missouri*, 248 U. S. 365, the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any

> other person from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that as applied to grain received from or shipped to points without the State it burdened interstate commerce. Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in *Munn* v. *Illinois.*"

And the Supreme Court of the United States in *Cargill Co.* v. *Minnesota,* 180 U. S. 452, had under its consideration the right of the State of Minnesota to license warehouses. The question of the burden on commerce arose, and we quote from said decision at page 470:

> "It is also contended that the requirement of a license from the defendant company is inconsistent with the power of Congress to regulate commerce among the states. This view cannot be accepted. The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state or the shipment out of the state of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the state between the defendant and the sellers of grain. We do not perceive that in so doing the state has entrenched upon the domain of Federal authority or regulated or sought to regulate interstate commerce. In no real or substantial sense is such commerce obstructed by the requirement of a license."

In the case of *Sherlock, et al* v. *Alling,* 93 U. S. 99, this Court said at page 104:

> "It may be said, generally that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely af-

fecting the operations of commerce,is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce foreign or interstate, or in any other pursuit."

To the like effect is the early case of *Munn* v. *Illinois*, 94 U. S. 113, in which this Court approved the right of the State of Illinois to regulate warehouses.

III.

THE STATE MAY REQUIRE PAYMENT OF AN OCCUPATION TAX FROM ONE ENGAGED IN INTERSTATE COMMERCE.

This right was recognized in the case of *Watters* v. *Michigan*, 248 U. S. 65, cited by us under Point I page 12 also in the case of *Raley & Bros.* v. *Richardson*, 264 U. S. 157, cited by us under Point 1, Page 12, *supra*.

In the case of *Osborne* v. *Florida*, 164 U. S. 650, in which this court sustained an annual license tax enacted by the statute of Florida, providing that a person engaged in certain occupations shall be licensed and pay a tax. The contention was made that an agent of an express company was engaged as such in interstate commerce and therefore should not be amenable to the statute. This court, at page 654, says:

"It has added, however, that under the provisions of the statute, if the company engaged in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the Supreme Court of Florida does not exempt the express company from

> taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution."

In the case of *Postal Telegraph Cable Co.* v. *Charleston,* 153 U. S. 692, the Court sustained the right of the City of Charleston to require a license of the Postal Telegraph Cable Co. of New York, a New York corporation. The contention was made that where the company merely maintained an office, it was immune from taxation on the ground that it was engaged in interstate commerce and that its city offices are merely initial points for sending and receiving messages. This Court ,at pages 699, 700, says:

> "If the business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power."

The case of *Sligh* v. *Kirkwood,* 237 U. S. 52, cited by Mr. Justice Wilson in his opinion, recognizes the right of the state to regulate certain lines of business even though in so doing they may incidentally interfere with interstate commerce.

Counsel for the appellant take exception to the decision of his Honor Justice Wilson, who relied on the case of *Hopkins* v. *The United States,* 171 U. S. 578, and cite in approval thereof *Stafford* v. *Wallace,* 258 U. S. 495 (page 15—Appellants brief.) The decision of this Honorable Court at page 524 in the Stafford case, *supra,* says as follows:

"So, again, the line is distinct between this case and *Hopkins* v. *United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnish certain facilities for the sales. Therefore there again the effect of the combination of brokers upon the commerce was only indirect and not within the act."

And it may be mentioned that this Court in Stafford case approves the doctrine as laid down in *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299, wherein the nature of the business transacted by Bacon is to a large degree similar to the business transacted by the Cross Company and other commission merchants, and this Court seems to sustain the contention made by the State of Illinois that where merchandise comes at rest in the state to be disposed of it is no longer immune from taxation because in transit in interstate commerce. (page 526.) The Court in Stafford case, *supra*, cites many cases to sustain this doctrine in its decision and we quote from the decision of the Court as follows:

"Thus, take the case of *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299. Bacon had purchased grain in transit from a western state to the east. He exercised the power under his contract to stop the grain in Illinois and put it in a grain elevator there. He intended to send it on to some other state for sale. He might have changed his mind. He did, however, after a time, send it out of the state. The

> grain was taxed while it was in Illinois. The question was whether it was immune from taxation because in transit in interstate commerce. Following the cases of * * * it was held that property in a state which its owner intends to transport to some other state, but which it not in actual transit, and in respect to the disposition of which he may change his mind, is not in interstate commerce just because of the intention of its owner, and may, therefore, be taxed by the state where it is."

It seems to be the doctrine that where one intends "to transport to some other state but it is not in actual transit and in respect to the disposition of which he (the owner) may change his mind, is not in interstate commerce just because of the intention of its owner and may therefore be taxed by the state where it is."

One can readily disregard the case of *Bedford Company* v. *Stone Cutters Association,* 274 U. S. 37, advanced by counsel, for the reason that the facts in said case are so remote as to render no enlightment as to the legal conclusions reached in the Hopkins case.

The case of *Stockard* v. *Morgan,* 185 U. S. 27, (cited by counsel) may be distinguished from the instant cases for the reason that in the case cited, the merchandise never came *to rest* within the State of Tennessee. The brokers were simply selling agents with regard to the interstate shipments and shipments were in no way under control of the broker.

We can answer likewise the case of *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, quoted by counsel. This is a case in

which a *discriminatory tax* is made against a merchant importing milk from Vermont where the production price was lower than the New York price, and consequently the Act of New York State ought to be enjoined was one of a discrimination. The decision of the Court in this case seems to sustain our contention rather than that of appellants and we take the privilege of calling this Honorable Court's attention to the decision at page 526 in which the Court says:

> "A state tax upon merchandise brought in from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise because of its origin in another State." *Sonneborn Bros.* v. *Cureton, supra,* at p. 516. *Cf. McDermott* v. *Wisconsin,* 228 U. S. 115, 133; *Bowman* v. *Chicago & N. W. Ry. Co.,* 125 U. S. 465, 491; *Brimmer* v. *Rebman,* 138 U. S. 78; *Savage* v. *Jones, supra,* at p. 525; *Western Union* v. *Foster,* 247 U. S. 105, 114; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 493.

Counsel also states with approval the case of *Texas Transport & T. Co.* v. *New Orleans,* 264 U. S. 150. To this statement of counsel we find a distinction from the regulatory laws in the instant case. In the Texas case, the right of a municipality to impose a license tax upon an agent of a steamship company soliciting business, acting purely as agent for foreign companies, is questioned, and from the facts, it is admitted that the said agent was engaged in interstate business and had no relationship to local business.

To the like effect is the case of DiSanto v. Pennsylvania, 273 U. S. 34.

We likewise contend the case of *Real Silk Hosiery Co.* v. *Portland;* 268 U. S. 325, is not a commanding case because in this case it is purely a question as to whether or not a non-resident merchant shall have a right to send salesmen into a community for the purpose of soliciting orders to be shipped from out the state to its customers within the state. Such an effort by the state to prohibit a transaction of this kind, makes a discriminatory tax and a burden against the merchants beyond the state which has been frequently condemned by this Court.

The cases of *Real Silk Hosiery Co.* v. *Portland, supra,* and *Shafer* v. *Farmer's Grain, supra* and *DiSanto* v. *Pennsylvania, supra,* have been treated at length with approval in the case of *Interstate Busses* v. *Holyoke Street Railway Company,* 273 U. S. 45, 71 L. ed. 530. In this case an effort was made to restrict law enforcing officers from molesting a motor bus company operating intrastate as well as interstate, and taking fares between Hartford, Conn., and Greenfield, Massachusetts. The court makes a pronounced distinction from the cases above cited and the court uses the following language at page 51:

> "It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the Act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employes."

Counsel cites the case of *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, this case reaffirms fundamental law involving the usual question as to what is "doing business within the State without having complied with the foreign corporation law."

This question was decided by this Honorable Court on one point only at page 291.

> "A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." (Citing various decisions.)

To this principle of law, there can be no denial.

But this Court, in the case of *Kansas City Steel Company* v. *Arkansas,* 269 U. S. 148, cites with approval the Dahnke-Walker case, but distinguishes this case when the question is involved as to a corporation entering into business in another state and not obtaining a license where such a business become an intrastate business.

In the Kanas City Steel case, *supra,* the Court, at page 152, says:

> "So far as concerns the question here involved, the situation is equivalent of what it would have been if the materials had been shipped into the State and held for sale in a warehouse, and had been furnished to the subcontractor by a dealer. We think it plain that the plaintiff in error did business of a local and intrastate character in Arkansas before it obtained permission."

The reasoning in the Kansas City Steel case, seems to follow the rule that the business of a commission merchant being such that it becomes a local business and not an interstate business.

The Illinois statute is void of any prohibition against any person or resident or non resident entering into the State of Illinois for the purpose of creating a commission business.

The case of *Sprout* v. *City of South Bend*, 277 U. S. 163, does not deny our contention that one can require payment of an occupation tax from one engaged in both interstate and intrastate commerce. On page 171 the Court says:

> "The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny."

The business of commission merchants is purely local, the rule in the Sprout case does not apply to their business. Counsel cites *Federal Trades Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52. We think the language this court uses at page 65 is significant. There the Court cites with approval the cases of *Ware and Leland* v. *Mobile County*, 209 U. S. 405, and *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593.

The case of *Furst* v. *Brewster*, 282 U. S. 493 and *Corson* v. *Maryland*, 120 U. S. 502, cited by counsel are manifestly

in line with the case of *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, and other cases along this line.

We find no fault with the law as applied to the facts in those cases, but call the Court's specific attention to the fact that the Corson case limits its decision purely to the facts involved in that case. It does not apply to the instant question as to the right of requiring of local merchants before entering into a business to obtain a license.

In the case of *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, we urge that in this case the Court consider the following statement made at page 472. This Court says as follows:

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

In the case of *Local 167, International Brotherhood of Teamsters, etc.* v. *United States,* 291 U. S. 293, cited by counsel, the Court at page 297 limits its decision in the following language:

> "It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers, the movement of the poultry ceases to be interstate commerce." (Citing many decisions).

While counsel for the appellant in arguing their point 1 have made learned statements and have indulged in con-

siderable research, the various decisions cited by them are remote when they fail to show in these various decisions a single case in which the courts have held that the State may not under its police power license said businesses such as commission merchants, even though in so doing a burden may be incidentally be placed upon interstate commerce, nor have they been able to refute the doctrine that when merchandise comes to rest it ceased to be an instrument in interstate commerce.

IV.

WHERE A POLICE POWER OF THE STATE IS INVOLVED, AN ACT OF THE LEGISLATURE TO PREVENT FRAUD ON THE PUBLIC, ALTHOUGH INCIDENTALLY INTERFERING WITH INTERSTATE COMMERCE IS, NEVERTHELESS, VALID.

May we call this Court's attention to the fact that various other states in the exercise of police power have regulated commission merchants. To the same effect, are the statutes of various other states, a few of which we may mention:

Idaho, Annotated Code, 1932, Section 22, Paragraph 1001, et seq.;

Indiana Statutes, 1932, Section 10—213;

California—Producers Act, 6155—General Laws of Calif.;

Louisiana—Farm Product Dealers General Statutes, 1932, Section 207-208, Chapter 15;

Michigan—Compiled Laws, 1929. Section 9738;

Minnesota—Mason's Minnesota Code, 1927. Section 197, et seq.;

Missouri, 4113-4115. Section 10077;

New York—Cahill's Consolidated Laws of New York, 1930. Article 21, Section P. 244, et seq.;

Ohio, Page 5 Annotated Code, Chapter 4-A.

A few of the other States have similar provisions. We cannot help but think that the law was enacted in furtherance of safeguarding credulous farmers against fraud. The United States Courts have recognized the right of the State to license and tax persons engaged in business in which the public may be defrauded. We respectfully refer to the well known cases of *Hall* v. *Geiger-Jones,* 242 U. S. 539; *Merrick* v. *N. W. Halsey,* 242 U. S. 568; and *Caldwell* v. *Sioux Falls Stock Yards Company,* 242 U. S. 559. These are leading cases and are well known to the courts and in which the Supreme Court of the United States recognized the right of the State to create departments requiring licenses for persons engaged in the business of selling securities. They are similar and involved the so-called Blue Sky Law. In the Geiger-Jones case, at page 557, the Court answers the burden clause on interstate commerce in the following manner:

"The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore, contravenes the commerce clause of the Constitution of the United States. There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of State legislation, but it may imply permission of such legislation. In other words, the burden of the

> legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the National power. So much is a truism; there can only be controversy about its application."

At page 558 of the latter case the Court further treats upon the question of police power regulation wherein the same may interfere with interstate commerce and Chief Justice McKenna, in the decision of this case, speaks as follows:

> "It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally." (Citing cases)

Under the police power the right to impose a license and other taxation upon merchants and druggists using trading stamps, coupons or profit-sharing certificates was recognized by this court in the case of *Rast* v. *Van Damen*, 240 U. S. 342. The interstate commerce burden was argued and the statute sustained under police power even though incidentally the act in controversy affected interstate commerce.

In the recent case of *Cooney* v. *Mountain States Teleph. & Teleg. Co.*, 294 U. S. 384, this Court follows out the doctrine as heretofore pronounced by this Honorable Court, at page 394, as follows:

> "Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the

> amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout* v. *South Bend*, 277 U. S. 163, 171, 72 L. ed. 833, 837, 48 S. Ct. 502, 62 A. L. R. 45; *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 470, 75 L. ed. 1171, 1174, 51 S. Ct. 499."

In this regard, we may not go any further than the decision stated by Justice McReynolds in the case of *Payne* v. *Kansas ex rel Brewster*, 248 U. S. 112, heretofore cited.

V.

FEDERAL CONGRESS HAS RECOGNIZED THE RIGHT OF THE STATES TO MAKE CONCURRENT LEGISLATION WITH REFERENCE TO AGRICULTURAL PRODUCTS.

We would have no difficulty in conceding counsel's argument that the Perishable Commodities Act would have superseded the Commission Merchants Acts in its intendment were it not for the fact that Congress has specifically recognized the right of the States to cover the same subject matter.

We can find no more cogent words than the words used by Congress in Section 15 of the Federal Act, "Appendix B," appellee's brief. This section provides as follows:

> "*This chapter* shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this chapter; but it is intended that all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto." (Italics ours)

It must be noted in this regard that this Section 15 does not refer to the section of the Act alone, but includes the entire chapter.

Also significant in this regard is Section 6, Chapter B, in which the following language is used:

> "Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory * * * may file, * * * a complaint of any violation of any provision of Section 2 of this chapter * * *."

In our opinion Congress having specifically reserved the right to the States to enact laws covering the same subject matter, as hereinabove stated, the reasoning of the appellants to the effect that having taken jurisdiction over the agricultural commodities shipped in interstate commerce, the State of Illinois is bound by the Federal Act is a misconstruction of the Act.

In *Savage* v. *Jones*, 225 U. S. 501, this Court on page 533 lays down the following principle:

> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustration." (Citing many cases)

This doctrine is likewise followed in the later case of *International Shoe Company* v. *Pincus*, 278 U. S. 261, 265; in which opinion of the Court other cases are cited; likewise the case of *Sligh* v. *Kirkwood*, 237 U. S. 52.

In view of counsel's statement, page 45 of his brief, in which they quote from the Congressional proceedings one may well conclude that the bond provision of the Federal Act was eliminated purposely in order to give to the respective states the right to compel bonds and thereby put the burden on collecting on such bonds within the state authorities rather than the government agencies.

This conclusion seems unescapable when reading the proviso in Section 15 of the Federal Act.

VI.

IT IS NOW TOO LATE FOR THE PRINCIPAL, HENCE THE SURETY, TO RAISE THE CONSTITUTIONALITY OF THE ACT IN CONTROVERSY, HAVING BEEN IN BUSINESS A GREAT MANY YEARS AND PROCEEDED UNDER THE ACT. THEREFORE, WHAT APPLIES TO THE PRINCIPAL EQUALLY APPLIES TO THE SURETY, AND SINCE THE PRINCIPAL HAS NOT DEEMED IT ADVISABLE TO DEFEND THE BOND THE APPELLANT IS IN NO POSITION SO TO DO.

Has the surety the right to attack the constitutionality of the Act since this right is particularly within the province of the cross-company, the principal, and not the surety? We believe this is answered in Corpus Juris:

> "One attacking the constitutionality of a statute must show that it affects him injuriously and actually deprives him of a constitutional right. It is not sufficient that the statute is unconstitutional as to other persons or classes of persons. It must affirmatively appear that the person attacking the statute comes within the class of persons affected by it." 12 C. J. 762 and 763.

Counsel for the appellants urge that the statute being void must therefore relieve the principal from the bond and likewise, relieving the principal, the liability of the surety is thereby voided. We take issue with counsel in this regard because the stipulation of facts, page 15 T. R. Fol. 74, shows that the Cross Company had been in business for a number of years previous, prior to the time when liability was incurred on their bonds. They have successively from year to year conducted their business and became amenable to the conditions of the Act. It appears from the stipulation of facts that during this time, no question was raised as to the validity of the Statute under which they acted.

In the case of *Detroit Int. Bridge Co.* v. *Corporation Tax Board,* 287 U. S. 294, where the question was raised as to the validity of a tax, this Court at page 298, says as follows:

> "Indeed, appellant did not at first claim that its powers and activities are limited to foreign commerce. On the contrary it sent to the secretary of state with its annual report of 1929 the prescribed minimum fee of $10. and with that of 1930 the sum of $145.92. It did not then construe the Act as not applicable to any business within the scope of its authorization under its articles and the laws of the State, but merely that it was not liable for as much as the state taxing authorities laid against it."

Counsel, on pages 49 and 50, cite the case of *Moses* v. *United States Indemnity Co.,* 166 U. S. 571. We accept their statement with approval. A perusal of the *Moses Case* leads one to believe that the doctrine of this court is firmly

established, that a bond cannot be escaped where voluntarily entered into.

In the case of *United States* v. *Bradley*, 10 Pet. 343, 39 L. Ed. 448, Justice Story delivered the opinion of the court and after referring to the *Tingey Case*, this court lays down the doctrine. The court said, at page 360:

> "That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded on illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period."

And Justice Story further, on page 363, delivering the opinion of the court, says as follows:

> "Upon the whole, upon this point, we are of the opinion, that there is no solid distinction, in cases of this sort, between bonds, and other deeds containing conditions, covenants or grants, not *malum in se*, but illegal at the common law, and those containing conditions, covenants or grants, illegal by the express prohibition of statutes. In each case, the bonds or other deeds are void as to such conditions, covenants or grants, which are illegal; and are good as to all others, which are legal and unceptionable in their purport. The only exception is, when the statute has not confined its prohibitions to the illegal conditions, covenants or grants; but has expressly, or by necessary implication, avoided the whole instrument, to all intents and purposes."

a

There does not seem to be any *malum prohibitum* in the instant case but the same appears to be a voluntary guaranty irrespective of the statute. In *United States* v. *Hodson*, 10 Wal. 406, 407, 19 L. Ed. 937, 940, this court held that a bond required by statute before a business license is issued, imposing a penalty on one exercising such bond without a license, is a voluntary bond.

We believe that the giving of the bonds in the instant cases represented a voluntary act on the part of both the principal and the sureties and the giving of such bonds could be more consistently be construed as voluntary offering and not under color of a statute.

The Cross Company had the privilege of accepting the benefit of the Commisson Merchants Act and voluntarily giving a bond for the payment of consignments, or refusing to accept consignments of merchandise and paying for them as received.

There is no extortion in this bond and we think that the case of *Moses* v. *United States, supra,* and *United States* v. *Bradley,* is in line with the Detroit Bridge case above cited.

For the various reasons cited in our argument, we believe that this case should be sustained in this Honorable Court.

Respectfully submitted,

OTTO KERNER,
Attorney General of Illinois,
Attorney for Appellee.

LOUIS SALINGER,
Assistant Attorney General,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 692.—October Term, 1935.

Hartford Accident & Indemnity Company, Appellant,
vs.
People of the State of Illinois, ex rel. Walter W. McLaughlin, Director of Agriculture.

Appeal from the Supreme Court of the State of Illinois.

[April 27, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

An Illinois statute[1] forbids persons, associations, and corporations to receive, sell, offer, or solicit consignments of farm produce for sale, on commission, within Illinois, unless licensed; requires an applicant for a license to make a showing as to character, responsibility, and good faith in the conduct of the proposed business; and directs that a license must be procured for each location where the business is to be transacted, a fee paid therefor, and a bond, in the sum of $5,000, with satisfactory surety, executed, conditioned on honest accounting and handling of produce received and against fraudulent conduct. Provision is made for the granting and revocation of licenses by the Director of Agriculture. A licensee is required to follow certain business methods, to keep records, which are to be subject to inspection, to account and to pay for produce received for sale. The Director is empowered to bring action upon the licensee's bond for the recovery of sums due consignors for goods sold, if payment is not made by the licensee, or for the recovery of damages suffered by consignors as a result of fraudulent acts or wrongful handling on the part of the licensee. Should the penalty of the bond prove insufficient to pay all such liabilities, the consignors are to receive payment of any amount recovered in proportion to their several claims.

The Cross Company took licenses, and the appellant became surety on its bonds, for the years ending July 1, 1932, and July 1, 1933. In October, 1932, the Cross Company became bankrupt and

[1] Smith-Hurd, c. 5, §§ 17-24; Cahill's Ill. Stat. c. 5, §§ 24-32.

failed to account for numerous consignments of fresh fruits and vegetables. Some were shipped from Illinois but most were from other states. The Director of Agriculture brought actions in a state court on both bonds. The court consolidated the cases and they were tried together on stipulated facts.

The appellant, in addition to defenses raising no federal question, pleaded that the statute was beyond the state's power because a restriction upon, and a regulation of, interstate commerce. Judgment was entered against the Cross Company and the appellant. Both appealed to the Supreme Court of the State, which affirmed the judgment.[2] The appellant summoned and severed the Cross Company and prosecuted an appeal to this court.

The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders.[3] Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article I, Section 8, of the federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective.[4]

The appellant urges, however, that Congress has adopted an act[5] regulating the same business and the Cross Company was required to take a license under that act. This alone is not sufficient to nullify the state law, if the federal act does not cover the same field, or is consistent with it.[6] But it is said the state and federal laws are similar in their provisions and, therefore, the exercise by Congress of its paramount power nullifies the state statute. The federal

---

[2] *People* v. *G. H. Cross Co.*, 361 Ill. 405, 198 N. E. 356.

[3] *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 470; *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *The Minnesota Rate Cases*, 230 U. S. 352, 410; *South Covington Ry.* v. *Covington*, 235 U. S. 537; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 557; *Federal Compress Co.* v. *McLean*, 291 U. S. 17; *Chassaniol* v. *Greenwood*, 291 U. S. 584.

[4] *Sherlock* v. *Alling*, 93 U. S. 99; *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477.

[5] Act of June 10, 1930, c. 436, 46 Stat. 531. U. S. C. Tit. 7, §§ 499a-499r.

[6] *Sligh* v. *Kirkwood*, 237 U. S. 52; *Mintz* v. *Baldwin*, 289 U. S. 346.

act requires every person, partnership, association, or corporation, who is engaged in the business of receiving in interstate or foreign commerce perishable agricultural commodities, defined as "fresh fruits and vegetables of every kind and character", for sale on commission, to procure a license from the Secretary of Agriculture. The act parallels the state statute in respect of the requirements of proper accounting, honest dealing, and prompt remittance. While it provides for awards of reparation by the Secretary of Agriculture for non-compliance with its prescriptions, gives a right of action to consignors and shippers for violation of its provisions, authorizes the revocation of licenses and imposes penalties, thus covering to some extent the same ground as the State law, it does not call for the giving of any bond by a licensee. Moreover, Section 15 provides:

"This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto".

Thus the act of Congress not only omits the requirement of a bond, but affirmatively saves the provision of the Illinois act as to that form of security. As respects the bond and the protection thereby afforded to consignors, there is no inconsistency between the two acts and both may be given effect.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.